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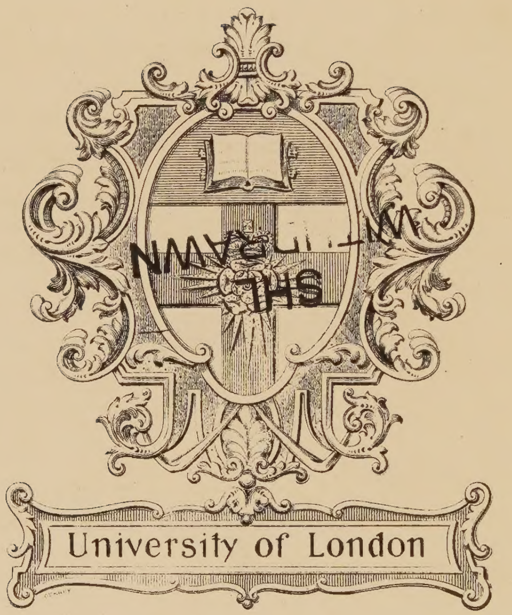
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THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

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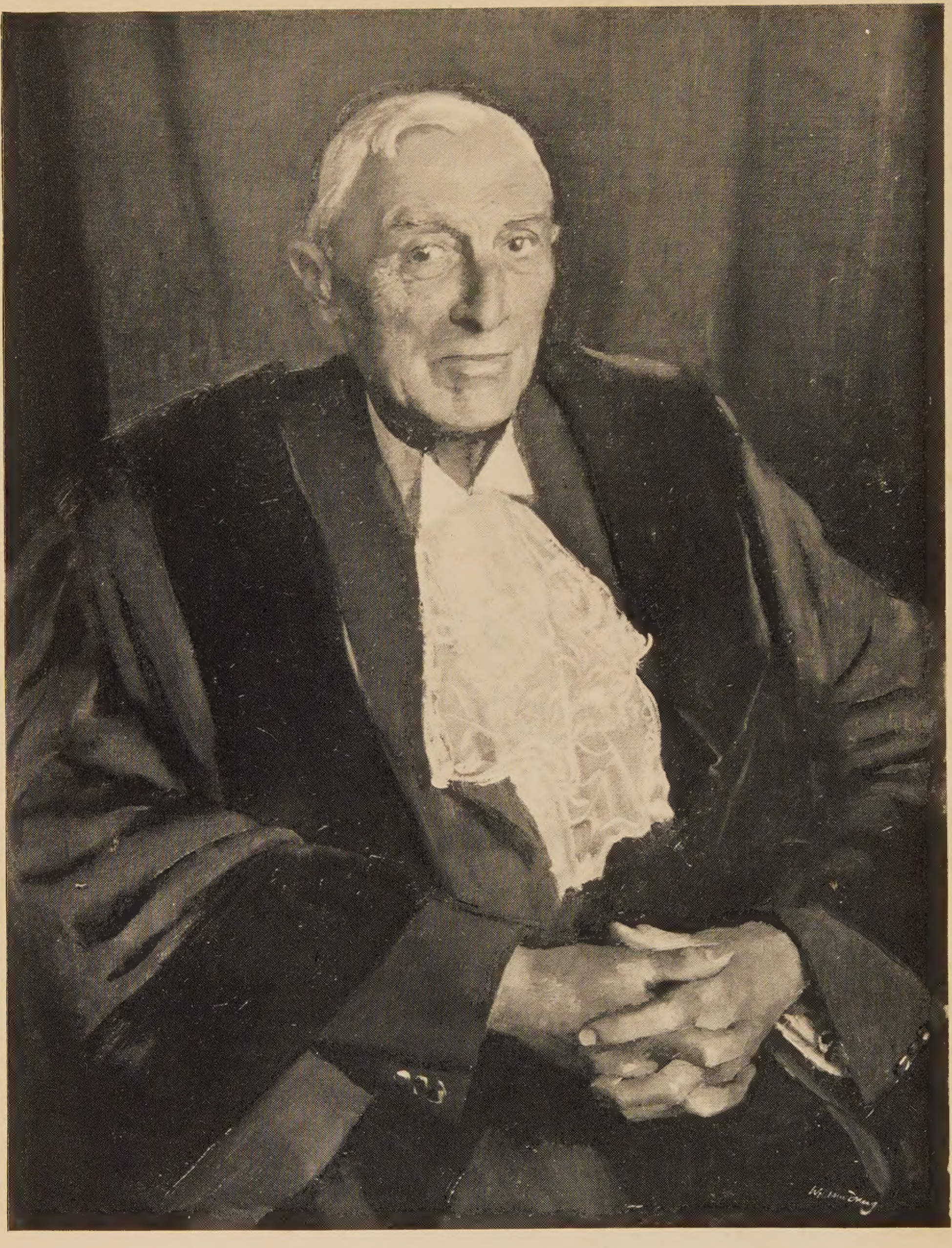

SIR CECIL J. B. HURST

G.C.M.G., K.C.B., K.C., LL.D.

Reproduction of the portrait of Sir Cecil Hurst by W. Dring, A.R.A., presented to him by the members of the Grotius Society, 1948

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1949

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THE FOUNDER OF THE *YEAR BOOK*
UPON THE OCCASION OF HIS
EIGHTIETH BIRTHDAY
IN GRATEFUL APPRECIATION OF
HIS SERVICES TO INTERNATIONAL LAW

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SIR CECIL HURST'S SERVICES TO INTERNATIONAL LAW

by

SIR ERIC BECKETT, K.C.M.G., K.C.

Legal Adviser to the Foreign Office

IT is natural and fitting that a number of the *Year Book* which is piously dedicated to its founder, Sir Cecil Hurst, should contain an attempt to appreciate his services to international law. The foundation of the *Year Book* was only one of many such services. It is perhaps also natural that one who began his own work in the sphere of international law as Sir Cecil Hurst's most junior colleague and thus came under his influence at the most impressionable age and who now occupies the post of Legal Adviser to the Foreign Office, which Sir Cecil Hurst then held, should be tempted to write this appreciation.

A brief mention of the salient events of Sir Cecil Hurst's eighty years may not be an inappropriate background for the appreciation of his work. Born a member of a Sussex county family with some landed possessions, some connexions with the law, and a great tradition of public service, Hurst's life began on the traditional lines of an English public school and Cambridge University. At Westminster, a school with an enviable reputation for scholarship, he was an exhibitioner. At Trinity, Cambridge, he obtained a First Class in Law. He was then called to the Bar and followed the English traditional course of first being a pupil in Chambers—under two famous masters who afterwards were eminent on the Bench, Lord Justice Scrutton and Mr. Justice Bray—and then being a junior in other Chambers—again famous Chambers—namely, those of (the then) Sir Robert Finlay, who afterwards became Lord Chancellor and later still the first British Judge of the Permanent Court of International Justice. Finlay, especially as Attorney-General, was perhaps more concerned with international legal work—it was the period of many international arbitrations—than any other of our Law Officers. It was during this period that Hurst first demonstrated his duty to public service by devoting all his spare time to social work in the slums of the East End of London at the Trinity College Mission and as Head of the College Settlement. Then in 1901 he married Sibyl, daugher of Sir Lumley Smith, sometime Judge of the City of London Court; throughout their forty-six years of married life, she was able to render loyal support in all his efforts for the public weal, internal or international, all the more effective because she shared his ideas so fully.

After his introduction to international law in Finlay's chambers, it was perhaps natural that Hurst should be attracted by, and appointed to, the post of Assistant Legal Adviser to the Foreign Office which was first created in 1902; and here in the Foreign Office we come to one of the principal spheres of Hurst's services to international law. Hurst was at the Foreign Office as Assistant Legal Adviser and later as Legal Adviser for twenty-seven years. He really set the pattern for legal work in the Foreign Office. It was a case of the man fitting the time. He came at a time when law was beginning to play a so much greater part in international relations, when it was no longer possible to rely entirely on the Law Officers of the Crown for advice on all international legal questions of importance or for the conduct of all international arbitrations. Hurst was not the man to miss opportunities of service, and from the moment he entered the Foreign Office until the time he left he was consistently one of the most hard-working members of it. In this period we find him at the second Peace Conference at The Hague in 1907 (after which he was made a Commander of the Bath), and British Agent and Counsel on the Pecuniary Claims Commission with the United States of America, whose work extended from 1912 to 1923. He was made a King's Counsel in 1913. Just before the outbreak of the First World War, Hurst was joined at the Foreign Office by his successor as Legal Adviser, the late Sir William Malkin. It would be difficult to find a pair whose qualities were more nicely complementary. I have often thought in this connexion of the dynamo and the flywheel. Hurst had the creative, constructive energy and enthusiasm. Malkin's more critical mind and calm temperament prevented jerks and stoppages and kept the machine running smoothly.

Then followed the First World War, a busy time for Hurst and Malkin, the former crossing the Channel frequently to go to Paris. In 1919 came the Peace Conference at Paris at which Hurst and Malkin were present almost the entire time, taking a large part in the drafting of long Peace Treaties. It was after this, in 1920, that Hurst was made a K.C.B. He then proceeded almost directly from Paris on the Milner Mission to Egypt and, returning from that, played a very big part in those early, creative meetings of the Assembly of the League of Nations. In 1924 he was made K.C.M.G. Then in 1925 and

1926 came the negotiations that led up to the Treaty of Locarno and in this connexion the part played by four lawyers, Hurst, Fromageot, Gauss, and Pilotti, became well known. His special services here were recognized by the G.C.M.G. During the three last years that he remained at the Foreign Office he often appeared as Counsel in cases before the Permanent Court of International Justice.

In 1929 he was proposed as the British candidate to fill a vacancy on the Hague Court created by the death of Lord Finlay—long previously his leader in Chambers—and it is worth while recording that at this time it was the judicial element in the United Kingdom that particularly insisted that Hurst was the man who should be nominated.

How do we assess Hurst's services to international law as Legal Adviser to the Foreign Office? To assess them exactly we must wait for the lapse of many years till the papers in the Record Office are open to public inspection. Till then Hurst's services as Legal Adviser are inseparable from the general record of the conduct of His Majesty's Government, and all that an observer from inside can now properly say is that he believes the value of his work to have been very great.

On the Hague Court Hurst was a judge for fifteen years, but only during the first nine of these was the Court regularly sitting and functioning. Perhaps the best testimony to his value as a judge is the fact that, within four years after his first appointment, he was chosen as President of the Court and in that office served for three years. Hurst was not a great writer of dissenting judgments or separate opinions. His contribution to the work of the Court finds its place in the Court's judgments and opinions and in his dignified conduct of the proceedings as President both in the public and in the private meetings of the judges.

In the Second World War we find Hurst for three years as Chairman of a Home Office Panel for Appeals by anti-Nazis against orders of detention under Regulation 18 B, followed by two further years as the first President of the United Nations War Crimes Commission. Hurst held the presidency of the War Crimes Commission at a most difficult and trying time. The Allies created the War Crimes Commission in haste, when virtually the whole of the attention of their Governments was focused on winning the war. Having so created it, they had at first very few ideas as to what precisely they wanted it to do and gave little or no assistance to its members in the task with which they had entrusted it. Nevertheless, the Commission, during these two years, did much work, which is admitted to have been of great value by those who came after in 1945, when hostilities were over and the President and members of the War Crimes Commission first began to receive the support and assistance from their Governments which their work deserved.

But this record of official and judicial service by no means exhausts Hurst's services to international law. Indeed, perhaps it hardly covers what is in some ways the most remarkable part of them. It was Hurst's view that, if international law was to develop and flourish, it must be supported in the various countries by an adequate literature and that general interest in the subject amongst lawyers must be stimulated by lectures and discussions; in this work, he thought, the lawyers of the Foreign Office had a particular part to play. Those who spent their life in the one place where international law was constantly practised must assist in contributing to the literature, the lectures, and the discussions. They must lend to university professors and other non-official writers their good offices in persuading a busy Foreign Office, most properly respectful of the secrecy of its archives, that the public interest would be served if these learned and trustworthy persons were allowed to see papers in order to extract from them the purely legal and non-political material which they must have if they were to write books accurately setting forth international law which is so much based upon the practice of states. These views he imparted to his legal colleagues, and his personality was such that the reception of his views would almost invariably provoke a desire to comply with them. But however great that desire, their capacity would not enable them to do as much in this way as Hurst did himself. Inspired by these views Hurst founded in 1922 this *British Year Book*, of which for many years he was Chairman and Editor. Though the first number of the *Year Book* does not reveal the fact and merely shows him as one of an Editorial Committee of four, it is the fact that the initiative was Hurst's. How, in this period, and given his other activities, he managed to find time to edit the *Year Book*, which, from its beginning, was always a publication of the highest legal value, must remain a mystery which is only partly resolved when it is known that he enjoyed the devoted assistance of the most able and industrious Miss Dougherty. But this is not all. Hurst lectured at the Hague Academy and was a member of its Curatorium. He played a big part in the meetings of the Institute of International Law. He wrote the legal articles and addresses which are now being collected and published in a separate volume, and a glance at this volume will show that both in quality and quantity they are remarkable as the production of a man so deeply immersed in official work. The feature of this collection is the happy blend of scholarship with practical experience. Most of the papers could not have been written by either the pure scholar or the pure practitioner. They are all marked by the wisdom and robust common sense that are characteristic of their author, and many of them, as the reader will recognize, have already produced visible effects both in policy and in legal thought.

Lastly, and perhaps in some ways more indicative of his mind and attitude than anything else, there is the fact that, in the darkest days of 1940, he assumed the presidency of the Grotius Society and nursed it, during the ensuing eight years, into an activity perhaps greater than it had ever displayed before. In the year 1940 he was also Treasurer of the Middle Temple, having become a Bencher there in 1922. He was also Chairman and a founder of the Allied Lawyers' Foyer which was organized by the British Council in 1941 and continued for five years, and I have often heard how much the hospitality of that Foyer was appreciated by the Allied lawyers in exile in the United Kingdom during the war.

In all his work, Hurst has been assisted by three enviable gifts of Providence: a stature and a profile which would attract to him attention and respect in almost any gathering, a simple and direct mind which goes straight to the heart of the matter, and a perfectly natural gift for speaking the English language in short sentences and simple words in a manner which makes it particularly easy for the foreigner to understand. Further, and for this the credit is due to him and not simply to Providence, his courtesy and kindliness and his sympathetic understanding of other people's views curbed and, as years advanced, completely conquered that natural impatience of temperament which nearly all men of dynamic energy have. These qualities and his transparent honesty of purpose assisted him in all his work.

In the last century there have been a number of most distinguished men in the United Kingdom whose services to international law are great, and some of them are living to-day. There can be few during the whole century who have done as much for international law as Hurst, and there is no one living in the United Kingdom to-day whose services can be said to have been as great.

ASPECTS OF STATE SOVEREIGNTY

By SIR ARNOLD McNAIR, K.C.

THIS is an early fragment of a work which will attempt to trace the development of public international law in England as evidenced by the Opinions given to the Crown by its Law Officers and other legal advisers during the past three or four centuries.[1]

For those who would examine the development of the common law or of equity the law reports are the primary source, but the sources of the international lawyer are different and are not so readily available. Apart from prize, spoil, and piracy and an occasional case on diplomatic immunity, the law reports yield practically nothing until the nineteenth century; that century yields a little; and this century, with the help of several considerable wars, has already yielded a good deal. But in the nature of things there is a vast field of international law which municipal courts of law are never likely to touch; more and more we find international tribunals working in parts of this area, but the main source of law, apart from treaties, lies in the practice of governments. It is a delusion affecting the minds of many laymen and not a few lawyers that in this area governments act independently and capriciously and without reference to legal principle. Those who have worked in, or in the archives of, Foreign Offices realize that the ordinary, routine, non-political business of the world is carried on through Ministries of Foreign Affairs and diplomats against a background of law, slowly built up in Western Europe during the past three or four centuries and gradually spreading throughout the civilized world.

In England the early 'Opinions of the Doctors', the later Opinions or, to use the technical term, 'Reports', of the Law Officers, and, in more recent years since the Foreign Office acquired its own legal staff, the minutes of members of that staff, afford evidence of what the Crown's legal advisers have from time to time believed the law to be. That is not to say that this is the law. No state alone can make law. But it is valuable to know what any state's legal advisers believe to be the law, because in the overwhelming majority of cases it is that advice which governs the practice of that state. As their Opinions are highly confidential and are not likely to be published, if ever, before the lapse of half a century, the authors have every inducement to state their genuine opinion and not to present an argument in support of the interests of their country.

The fact that the action of governments in the international sphere rarely comes before courts of law enhances the value of these Opinions.[1] Like judgments they are unequal in merit. They also bear a resemblance to judgments in that the Cases upon which they are based usually contain a fair and objective statement of the facts and of the opposing legal arguments, with the result that most of the Reports have a strong judicial flavour; moreover, they frequently refer to previous Reports and follow or modify or develop them; for the most part, they are not made merely *ad hoc* but as part of a system, and with intent to create on each topic what the French lawyers call *une jurisprudence constante*. This is not the place to state the history of the 'Law Officers', but it is necessary to say that the term comprises, with the Attorney-General and Solicitor-General, the King's or Queen's Advocate (and sometimes the Admiralty Advocate).[2] The King's or Queen's Advocate was the standing adviser; so long as his office continued, only a small minority of questions went to the Attorney and Solicitor jointly with him. He has to a large extent been replaced, so far as international law is concerned, by the Legal Adviser on the staff of the Foreign Office and his assistants. It must be added that our aim is merely to tell the story, to provide some of the evidence, not to assert what the law was or is or should be.

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[1] I find that most history of international law is either a history of its literature, or a history of international relations including political doctrines such as the Balance of Power or the Monroe Doctrine. It is difficult to find much history of the content, that is, the actual rules of law as applied in practice.

Heads of states and Governments of states

A few words are required before we consider the Reports which follow. Heads of states and Governments of states are not the same thing, except where the Head, be it an individual (e.g. an absolute monarch) or a group of individuals, is also the Government. Thus the monarch of a constitutional monarchy is the Head of his state but not its Government; on the other hand, a military dictator could be both the Head and the Government of his state.

The Reports printed in this section illustrate, amongst other things, the persistence and identity of a state's personality in spite of changes in the physical person of its Head, or in the constitutional character of its Head (for instance, a monarch, or the President of a republic, or a dictator), or in its Government. These changes may be due either to natural events such as death, or to constitutional events such as the peaceful conversion of a monarchy into a republic, or to revolutionary events. It is unnecessary to point out that when a lawyer uses the word 'revolution' he is not concerned with the question whether there was a bloody revolution but simply with the question whether there was a break in the chain of legal continuity, however produced. The word 'succession' has been much misused in this connexion. Thus it is wrong to say that in 1870 the Third Republic succeeded to the rights and obligations[1] of Napoleon the Third. The rights and obligations (using that word in the sense of duties) were those of France, and the personality of France persisted in spite of the changes in her constitutional structure and in her Government. This is merely another way of saying that, to-day at any rate, (*a*) Heads of states and (*b*) Governments are the agents or representatives of their states. But it is comparatively recently that this has been fully recognized, and the legal advisers of the Crown have found it necessary to draw attention to it time after time. One of the main consequences of this rule of the persistence of the personality of a state until it is destroyed as a result of annexation or dismemberment or some similar event, is the persistence of its rights and obligations.

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[1] See in the Preface to Smith, *Great Britain and the Law of Nations*, vol. i (1932), p. v, the copy of a proposal by Sir John Harding, Queen's Advocate, in 1854, that a selection from these Opinions should be published. In *Campbell* v. *Hall* (1774), Lofft 655, 1 Cowper 204, which was argued four times, several Opinions by former Law Officers on questions of constitutional law were cited; their value is discussed (Lofft at p. 736), and Lord Mansfield, C.J., adopted an Opinion given by Sir Philip Yorke and Sir Clement Worge in 1722 (1 Cowper, at pp. 212, 213); the main question was the constitutional effect of the conquest of Grenada upon the power of legislating for the island.

[2] Atlay, *Victorian Chancellors*, vol. ii (1908), p. 454, states that the old practice was to send the papers first of all to the Queen's Advocate and then to the other Law Officers, apparently to the Attorney-General first. Presumably the Foreign Office decided whether to be content with the Opinion of the King's or Queen's Advocate, or to consult the Attorney- and Solicitor-General as well. All three were comprised in the expression 'Law Officers of the Crown', and until September 1862 the Queen's Advocate's signature came first. The volumes in the Public Record Office contain many requests from the King's or Queen's Advocate that he should have the assistance of the Attorney- or Solicitor-General, and on 20 October 1728 (*S.P. Domestic*, 36, 151) we find Sir Philip Yorke, A.G., asking for the assistance of the King's Advocate as the question concerns the law of nations. That office came to an end on the retirement of Sir Travers Twiss, Q.C., in 1872, much, in my opinion, to the loss of international law in the United Kingdom. The King's and Queen's Advocates all, or mostly, were members of Doctors' Commons and specialists in the Law of Nations, and their Reports carried on the traditions of the 'Opinions of the Doctors' of the sixteenth and seventeenth centuries.

The Reports and extracts which follow[2] may be grouped under the following headings:

1. The persistence of the personality of the state.
2. Deposed, abdicated, and refugee monarchs.
3. The distinction between the public and the private character of the Head of a state.
4. The nature of the obligation contracted by a state when borrowing money from individuals.
5. Sovereignty in relation to the persons and property of subjects.
6. Liberty of action as to coinage and currency.
7. Criminal libels upon Heads of foreign states.
8. Effect of ostensibly sovereign acts on the part of individuals:
   (*a*) Whether a British subject can be a foreign independent sovereign: the strange case of Rajah Brooke; (*b*) Occupation of territory by subjects; (*c*) Acquisition of territory as a result of conquest by, or cession to, subjects.
9. The Monroe Doctrine.

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[1] See the judgment of the Supreme Court of the United States in *The Sapphire* (1870), 11 Wallace 164; 18 Wallace 51.

[2] Documents cited as F.O., &c., or H.O., &c., are in the Public Record Office. Spelling and punctuation have not been corrected or modernized.

1. *The persistence of the personality of the state*

(*a*) We begin with an extract from a Report[1] of Dr. John Marriott, the Advocate-General.

To the Rt. Hon. The Earl of Halifax.

Nov. 30th 1764.

My Lord,

In Obedience to His Majesty's Commands signified to me by Your Lordship's letter I have carefully perused the Papers transmitted to me, and have considered with attention the several circumstances relative to the question arising from the Succession to the Crown of the Two Sicilies in the present Royal Family, and the several Refusals of the late and present Kings of the Two Sicilies to adhere to the Treaty concluded at Madrid 1667, by which the Rights and Privileges of the British Commerce with Naples and Sicily were originally established. The Question arising on this subject is so exceedingly extensive in its Nature and Consequences that it merits the fullest answer possible. The Refusals of the Court of Naples are not to be justified upon the Principles of Equity and the Law of Nations established by their Common Consent and Usage in which Opinion I am founded by the following Reasons.

First, that all Treaties whatsoever whether of Pacification, Alliance or of Commerce concluded between Sovereigns of respective States are not *Personal* but *National* and therefore like all other national Rights and Obligations, inseparable from each other, *are valid in Succession.*

Were it otherwise, doubtless the Law of Nations would have required and established a Custom that all Treaties should be renewed and republished upon every Change of the Sovereign Person or mode of Government, but on the contrary the Usage of Nations never hitherto has required any such Acts of Renewal to give fresh Force of Obligation to Treaties, and in this Point the Law of Nations is founded upon the great Reason of Things, the *Utility* of all *Nations.*

By placing the Question between His Majesty and the Court of Naples in this Light equally important to both, it is to be reasonably expected that the latter will reflect on the Consequences of the Doctrine which it has insisted upon with so little shew of Justice in its Refusal to adhere to the Treaty concluded at Madrid in 1667 *as if its Validity had ceased with the Austrian Succession.*

If the Ministers of the Court of Naples mean to affirm positively that 'solemn Contracts which have long subsisted between One Nation and another are solely dependent for their Force on the Persons of Sovereigns or the Possession of a particular Family' I humbly apprehend not only that His Majesty's particular Interest is affected, but that the Interest of all Sovereigns are deeply concerned in opposing it. Because it cannot fail to place on the most unstable Foundations the Repose of Europe and to destroy that *Confidence* among all Orders of Mankind which is so necessary to the Glory of Sovereigns, and the Intercourse of Nations.

It is a Doctrine which, if it is allowed in its full Force is adapted only to a State of barbarous and perfect despotism unnatural to Europe; since if all Treaties between Sovereign and Sovereign are merely *personal* then it follows that Treaties of Pacification would be nothing in Effect but Truces (like those concluded avowedly as such by the Ottoman Porte with the Christian Powers) they would be dependent upon Lives and upon National Revolutions: And *Treaties of Commerce* would become Engagements of the most uncertain Nature possible; thereby destroying that which is the Foundation or rather the very Life and Soul of all Commercial Connections, *Security of Property*.

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[1] Law Officers (Letter Books), H.O. 49, vol. 2; printed in full in Smith, *Great Britain and the Law of Nations*, vol. i (1932).

Although the Principles of the Civil Law which are admitted by general Consent as the Law of Nations have determined, that Obligations 'strictly personal, like personal Privileges, die with the Person' yet the same Principles have also determined that 'whosoever succeeds to the Beneficial Rights of his Predecessor succeeds at the same time to all his Obligations'. The Reason is that the Successor is a *Mixt Personage* and takes and is taken reciprocally by the Right of Representation. Now in no Case does this Reasoning appear to operate more forcibly than in the Case of Sovereigns and of national Compacts for they contract for their People in a mixt Character as the Heads of a general Body of whose National Rights committed to their *Trust* by Providence they are the sacred Depositaries and perpetual Guardians.

It is in this View that Contracts entered into with the immediate and apparent Head of a State even de Facto tho' not de Jure are, and have been held to be safely entered into, and to be binding *nationally*; otherwise there could be no contracting at all between Nations under certain Circumstances, if the Right or Character of the Sovereign for the Time being were to render the Compact valid or invalid.

The Doctrine of the Nationality of Contracts which we insist upon is supported by the Annals and Examples of all Europe. The Treaties made by the Protector Cromwell with the several States of Europe were held obligatory upon the British Nation even after the Royal Family was restored and it is thus the Treaty made by him with Portugal has been allowed still to be in full Force, even in Times and in Cases disadvantageous to British Subjects.

It is no derogation from the High Dignity of Sovereigns to say that they are the Complex of all National Rights conveyed down from Time to Time and invested in their Persons perpetually: therefore no Change of Sovereigns can affect those Rights and Nations contract firmly with each other in the Persons of their respective Sovereigns, who have themselves no other Benefit from the Treaties entered into than as they make a Part of the general Combination existing reciprocally of Prince and People for mutual Support and Defence.

These Ideas are not peculiar to the British Nation and Governments. It is upon these Principles that the antient Custom of registering Treaties in the Sovereign Courts of the Parliaments of France, in View of making them more binding nationally, has become obsolete; because it is understood to be unnecessary in as much as these Principles existing this Practice can add nothing to the validity of Treaties whatever it might add to their Publicity. Contracted with the Sovereign they are as obligatory as they can be on the Nation. The Sovereign contracts not for himself as a private Person (for that Idea would be injurious to Sovereignty) but as a public One. In other words, he binds himself, his Successors and his People, as the great Representative of a whole Kingdom, who neither *dies nor changes* in his national Capacity.

. . . .

[The Advocate-General then proceeded to apply these general principles to the case in hand.]

It cannot be supposed that the Court of Naples will lay any stress on the Rights of *Conquest*, because, if that Plea were allowed in its full Force, yet the Case would then fall under the same Argument of Representation, and it would be answered that the *Conquest was not made personally by his late Sicilian Majesty*, but by Philip V party to the Treaty of Utrecht, who ceded to his Son. But there is a farther Answer that as the

Plea of Conquest would be the worst and weakest Title possible by which his Sicilian Majesty can hold his Dominions, having Titles much more solid, so it is a Plea which is supported neither in *Law* nor in *Fact*. The publick Law of Europe is a Stranger to the Idea of Rights of Conquest. Rights only known and allowed in Ages of barbarous Nations and amidst the Irruptions of Goths and Vandals into Europe. In Our Age of Humanity in which War itself is civilized, the Law of Arms *may give Possession but no Rights of Appropriation can pass or be vested securely but by solemn Treaty and Cession* between the Belligerant Parties and by the *Acquiescence* and *Recognitions of the rest of the Powers in Europe*—To ground a Right upon any thing else would tend to deprive His Sicilian Majesty of the Important Benefit of those Recognitions, to open perhaps a Justification to future Reconquests and set loose the most solemn Cessions whenever any Power more capable of setting up with Security such a Doctrine as the Court of Naples seems to avow, shall think proper to adopt it. But Kingdoms remote by their Situation from their natural Allies, Neighbours to their natural Enemies, and open to the Nations which are most powerful by Sea, cannot too strictly adhere to and *assert* for their own Interest and Security the Force and Faith of Treaties.

. . . .

For all which Reasons and Considerations I have the honour to submit, that His Majesty will be perfectly satisfied in insisting that the Treaty of 1667 be adhered to by the King of the Two Sicilies and that the Privileges of the British Nation remain inviolable and in full Force.

I am, &c.,
JAMES MARRIOTT

(*b*) On the liability of Peru upon certain bonds issued by a previous Government, Sir John Harding, Queen's Advocate, on 1 April 1857,[1] reported that:

> No principle of the Law of Nations is better established or of more universal application than that no State is discharged from its public obligations by a change in its Government.

(*c*) Certain British subjects had bought lands within the territory of the Argentine Confederation in conformity with the decrees of General Rosas who was dictator for twenty years. After his fall in 1852 and twenty years after the date of the purchases, the Legislature of the province in which the land was located, revoked them. The following is an extract from Harding's Report of 15 March 1859:[2]

> The principal question at issue seems to be, whether the Sovereign Acts of Rosas are to be considered binding upon the present Government as regards this particular transaction. The general principle of International Law is perfectly clear in the affirmative upon this point.
>
> A change in the form of Government of a Sovereign and Independent State does not affect its national personality identity or obligations 'inter gentes'. I need scarcely cite authority in support of this principle. Bynkershoek[3] propounds it most clearly in these words 'forma autem regiminis mutata non mutatur ipse Populus; Eadem utique

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[1] F.O. 83. 2318: Peru; see also Report by Dodson of 1 January 1847, FO. 83. 2304: Mexico.

[2] F.O. 83. 2228: Argentine. It is not clear whether General Rosas enjoyed recognition by the British Government at the time of the purchases, nor, I submit, does it matter.

[3] *Quaestionum Juris Publici Libri Duo* (1737), vol. ii, ch. 25 (1).

Republica est, quamvis nunc hoc nunc alio modo regatur'—and Vattel says 'Dès qu'une puissance légitime contracte au nom de l'État elle oblige la nation elle même et par conséquent tous les conducteurs futurs de la société'. Rosas having contracted in the name of the Republic, the present Government can no more be permitted to repudiate and annul his contract, than a succeeding Sovereign in a Monarchy could be permitted so to deal with a contract made by his predecessor.

(*d*) To the same effect Harding reported on 25 January 1860,[1] upon claims arising out of the recent civil war in Argentine:

With reference to the general principle involved in this Law,[2] I have only to observe that in the case of injuries inflicted on foreigners by two or more parties in a State engaged in an internal or Civil War, it is frequently the case that the party which ultimately succeeds and finally obtains possession of the Sovereign power finds itself compelled to compensate foreigners in respect of injuries and losses which were actually inflicted or caused by persons who were not only [? not] in the service of the (so-called) legitimate Authorities, but who were openly and forcibly opposed to them.

Thus the Monarch pays the debts contracted by the Republic which he subverted, or makes compensation for wrongs committed by the Government of the deposed rival, whom he treats as a Usurper; 'Eadem utique Republica est, (says *Bynkershoek*)[3] quamvis nunc hoc, nunc alio modo regatur: alioquin diceres, Rempublicam in statu quo nunc est, exsolutam videri pactis et debitis, in alio statu contractis.' 'A State (says *Kent*)[4] neither loses any of its rights, nor is discharged from any of its duties, by a change in the form of its Civil Government. The body-politic is still the same, though it may have a different organ of communication.'

The circumstance of the injuries in question having been inflicted by the employés of a Government which has been subverted, and is now called 'illegitimate' by its successors, cannot affect Foreign Governments, whose Subjects are the sufferers; they cannot be required to allow the validity of their claims to compensation to be submitted to or determined by any such test. The existing Government of the Argentine Confederation has succeeded to the obligations as well as to the rights of the preceding Government, whether such Government was legitimate or not; and it must discharge those obligations as its own, and without evasion.

(*e*) Sir Robert Phillimore, Queen's Advocate, on 15 September 1862, stated the principle as follows:

There can be no doubt that according to unquestionable principles of public and international law the obligations which a State, under one form of Government, or under one administration, contracts towards foreigners are binding upon it when that form of Government or that administration has been changed. Nor can there be any doubt that a retrospective law confiscating the property of an innocent owner is, whatever name may be given to it, a wrongful act.

But he distinguished this case from the one which precedes, by reason of the circumstances surrounding the purchases in the two cases, and in effect said that when a foreigner purchases land in a country which is 'in a condition of chronic revolution perpetually changing both its Government and its Laws', he is not entitled to the protection of his own Government provided that the treatment received by him is no worse than that meted out by the local Government to its own subjects.

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[1] F.O. 83. 2229: Argentine.

[2] Which purported to enact that no claims arising out of the recent civil war would be admitted except for losses caused by 'the legitimate authorities of the country'.

[3] See above, p. 11, n. 3.

[4] *International Law* (ed. by Abdy, 1866), p. 106.

(*f*) In October 1921 the delegates sent to a conference held in Brussels for the purpose of considering measures for the relief of the starving population in certain districts of Russia passed a resolution to the effect, *inter alia*, that 'the creation of credits to assist exports to Russia will only be practicable on the following conditions: (1) The Russian Government must recognize existing debts and other obligations arising from established claims....'

The following passages were, after legal advice had been taken, approved for inclusion in a letter to M. Krassin, the agent in this country of the Soviet Government:

> 4. But there are certain preliminary questions raised in that resolution [adopted in Brussels] which can and should be disposed of without delay. . . . They raise a clear and simple issue of principle, not of detail, and can be answered plainly and promptly. The first is that of the acceptance by the Soviet Government of the general principle that it is responsible for the fulfilment of the obligations which had been entered into and were binding upon previous Governments in Russia. The accepted rule among civilized States is that contracts made by and debts incurred by a Government are to be regarded as the obligations of the nation it represented and not as the personal engagements of the ruler. Although the form of Government may change, the people remain bound.
>
> 5. A further question deals with the recognition of obligations arising from established claims. The forcible expropriations and nationalisation without any compensation or remuneration of property in which foreigners are interested is totally at variance with the practice of civilised States. Where such expropriation has taken place, a claim arises for compensation against the Government of the country. It is to the recognition of these claims that the resolution of the Brussels Conference was directed.

2. *Deposed, abdicated, and refugee monarchs*

(*a*) The following Opinion of the Doctors[1] deals both with status and with diplomatic immunities.[2] It is only on the first topic that it is printed here. It indicates that a deposed monarch cannot accredit a diplomatic agent, but that a foreign monarch in custody in this country may have an agent who, if his credentials so provide, could be a diplomatic agent.

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[1] *Burghley State Papers*, vol. ii, p. 18. This early practice of seeking the 'Opinion of the Doctors' will be examined at a later date; meanwhile, the following other instances may be mentioned: 1568, on certain questions of prize law, printed in Marsden, *Law and Custom of the Sea*, vol. i (1915), p. 181, and vol. ii (1916), pp. 142–8; on the issue of letters of marque by the former James II, see below, p. 15.

[2] The occasion of this Opinion was the charge made against Leslie, Bishop of Ross, Ambassador of Mary Queen of Scots to Queen Elizabeth for conspiring in favour of the former against the latter. Upon his justiciability in England upon this charge, the Opinion was certainly wrong and was not followed. In 1584 when the Spanish Ambassador Mendoza was accused of taking part in a conspiracy against Queen Elizabeth the Opinion of Alberico Gentilis and Jean Hotman was taken; their Opinion was that the Ambassador could not be punished but should be returned to

The Opinion of the Doctors to the Articles, 17 Oct. A.D. 1571.

1. Whither an Embassador, procuringe an Insurrection or Rebellion in the Prince's Cowntrey, towarde whome he is Embassador, is to enyoye the Priviledge of an Embassador?

2. Whither he may not, *Jure Gentium et Civili Romanor.* be ponished as an Enemy, Traitor, or Conspirator against that Prince, notwithstanding he be an Embassador?

Tochinge these two Questions, we are of Opynnyon that an Embassador procuringe an Insurrection or Rebellion in the Prince's Cowntrey towards whome he is Embassador, ought not, *Jure Gentium et Civili Romanor.* to enjoye the Previleges otherwise dew to an Embassador; but that he maye notwithstandinge be ponished for the same.

3. Whither, if the Prince be deposed by the comen Aucthoritie of the Realme, and an other elected, and invested of that Crowne, the Sollicitor, or Doer of his Causes, and for his Ayde (although thother Prynce do suffer such one to be in his Realme) is to be accompted an Embassador, or to enjoy the Previlege of an Embassador?

To this we doe thincke, that the Sollicitor of a Prince lawfully deposed, and an other beinge invested in his Place, cannot have the Previlegs of an Embassador; for that none but Prynces, and such other as have Soverayntye, may have Embassadors.

4. Whither a Prynce, comynge into an other Realme, and remayning there under Custodye and Garde, ought or may have there his Sollicitor of his Causes; and, yf he have, whither he is to be cownted an Embassador?

To this we doe thincke that a Prynce, comynge into an other Prynce's Realme, and beinge there under Garde, and Custodye, and remayninge still a Prynce, may have a Sollicitor there; but whither he be to be accompted an Embassador, that dependeth of the Nature of his Comyssion.

5. Whither, if such a Sollicitor be so apoynted by a Prynce so flyenge or comynge into an other Prynce's Realme, if the Prynce in whose Realme, the Prynce so in Garde, and his Sollicitor is, shall denownce, or cause to be denownced, to such a Sollicitor, or to such a Prynce under Custodie, that his said Sollicitor shall hereafter be taken for no Embassador; whether then such Sollicitor, or Agent, can justly clayme the Priviledge of Embassador?

To this we doe thincke, that the Prince to whome any Person is sent in Message of Embassador, may for Causes forbidd him to entre into his Lands, or, when he hath recevyed him, comawnde him to departe; yet so long as he doth remayne in the Realme, and not excede the Bounds of an Embassador, he may clayme his Privilege as Embassador, or Sollicitor, accordinge to the Qualitie of his Commission.

6. Whither, if an Embassador be Confederacy, or be Ayder, or Comforter, of any Traytor, knowinge his Treason towarde that Prince, towarde whome, and in whose Realme he pretendeth to be Embassador, ys not ponishable by the Prynce in whose Realme, and ageinst whome such Treason is committed, or Confederacye for Treason conspired?

To this we do thinke, that an Embassador, aydinge and comfortinge any Traytor in his Treason, towards the Prynce, with whom he pretendeth to be Embassador, in his

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his own sovereign for trial, and it was acted upon by Queen Elizabeth. The error in the case of the Bishop of Ross is stated by Phillimore to have been due to a misapplication of Roman law (*International Law*, vol. ii (3rd ed., 1882), sect. 148).

Realme, knowinge the same Treason, is ponishable by the same Prynce, against whome suche Treason is comytted.

DA. LEWES.	WILLIAM AUBREY.
VAL. DALE.	HENRY JONES.[1]
WILLIAM DRURIE.	

(*b*) *James II of England* was in fact deposed but the Convention Parliament declared that he had 'abdicated the government', and he may be regarded as an abdicated monarch. In this condition his status came into question owing to the practice of commissioning privateers against the subjects of William III and Mary. He was doing this both while he still had a foothold in Ireland and after he had lost possession of all British territory. In 1693 the Privy Council took the opinion of six civilians upon the question of the piratical character of these privateers. The replies of five (four of the abovementioned six and one other) are printed by Marsden[2] and summarized by Phillimore.[3] It seems that of these five a majority of three against two held the opinion that the privateers were not piratical. The whole argument touched upon many aspects of sovereignty; amongst others, the representative character of a monarch was recognized, and an ex-monarch was likened to a proctor in a cause in civil law after the revocation of his proxy.

(*c*) *Napoleon Buonaparte*. The Elba episode need not detain us. On 11 April 1814 he abdicated the thrones of France and Italy for himself and his heirs, and Austria, Prussia, and Russia agreed with him that during his life Elba should form 'a separate Principality, which shall be possessed by him in full sovereignty and property'.[4] There can be no doubt that he retained his sovereign status. His status at the time of his deportation to St. Helena and thereafter was different, and the principal steps which were taken must be summarized.

Upon his escape from Elba and return to France on 1 March 1815, the Congress of the Powers then sitting at Vienna issued a Declaration[5] on 13 March to the effect that he had placed himself 'hors de la protection de la loi' and that 'comme Ennemi et Perturbateur du Monde, il a encouru la vindicte publique'. Waterloo was fought on 18 June, and Napoleon again abdicated the throne of France on 22 June. On 15 July he surrendered to Captain Frederick Maitland of H.M.S. *Bellerophon*. To use the modern term it was an 'unconditional surrender', because Captain Maitland declined to accept any conditions, stating that he had no authority to do so. He told Napoleon's agent, Las Cases, who negotiated the surrender, that he was 'not authorised to stipulate as to the reception of Buonaparte in

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[1] All the signatories except Henry Jones seem to be identifiable in the *D.N.B.*

[2] *Law and Custom of the Sea*, vol. ii (1916), pp. 146–8.

[3] *International Law*, vol. i (3rd ed., 1879), sect. 362, quoting extensively from a pamphlet published by a member of the minority.

[4] *British and Foreign State Papers*, vol. i, part 1, p. 134.

[5] Ibid., vol. ii, p. 665.

England, but that he must consider himself entirely at the disposal of his Royal Highness the Prince Regent'.[1] The story of the next few days, the discussions which took place between the naval authorities at Plymouth and the Admiralty in London and between the Admiralty and the War Office, and the conversations with Napoleon, are to be found in Captain Maitland's *Narrative* and in the following (amongst other) volumes in the Public Record Office: F.O. 97/159; W.O. 1. 736 and 737; and W.O. 6. 125. The gist of it is that in accordance with the instructions of the Admiralty he was 'considered and addressed as a General Officer'[2] and no more. None of the honours customary in the case of a sovereign were accorded him. He complained bitterly when he learned that he was to be sent to St. Helena. 'Among other insults', he said to Captain Maitland, '. . . they style me General! They can have no right to call me General; they might as well call me Archbishop, for I was head of the church, as well as the army. If they do not acknowledge me as Emperor, they might as First Consul. . . .'[3] At one interview with Admiral Lord Keith, Commander-in-Chief of the Channel Fleet, he protested that he was not a prisoner of war but a guest of England and referred to the writ of habeas corpus. So hallowed is the name of habeas corpus that it alarmed Lord Keith much more than the French had ever done, and in a note to Captain Maitland on 4 August he said: 'I have been chased all day by a lawyer with a *Habeas Corpus*!'[4] This so-called habeas corpus turned out in fact to be a mere *subpoena ad testificandum*[5] summoning Napoleon to attend a trial in the Court of King's Bench as a witness.[6] In the face of the direst adversity Napoleon's self-control and charm rarely deserted him. In fact, the fascination of his manners gave much anxiety to Lord Keith: 'D—n the fellow,' he said, 'if he had obtained an interview with his Royal Highness [which he wanted], in half an hour they would have been the best friends in England.'[7]

On 17 August H.M.S. *Northumberland*, with Napoleon on board, sailed for St. Helena. The sailors had nearly completed their share in the transaction, and we must turn to the lawyers. As early as 20 July the Prime Minister, Lord Liverpool, wrote to Lord Castlereagh that 'very nice legal questions' would arise from any attempt to confine Napoleon in this country,[1] but we can find no evidence of any official legal consideration of the deportation to St. Helena until much later. It is stated in a letter[2] from Lord Chancellor Eldon to Sir William Scott, undated but probably after the middle of October 1815, that 'the law officers, King's Advocate, Attorney, and Solicitor, have considered him as a prisoner of war'. Whether the Report referred to is the one dated 16 August 1815, printed at the end of this note, we cannot say; but so far we have been unable to find any other. It appears from Twiss's *Life of Lord Eldon*[3] that, in addition to the Law Officers, views were expressed by Sir William Grant, M.R., Lord Ellenborough, C.J., Lord Eldon, and Sir William Scott. The main aspect of the question which was troubling the legal conscience at so high a level was to find a legal basis for the detention of Napoleon *after* the official end of the war with France, if indeed in Lord Eldon's words, there had been [that is to say, in 1815] 'war with France as FRANCE'. Although the discussion took place at a high level in the official sense, the opinions expressed were diffuse and no useful purpose would be served by summarizing them here. At any rate it is clear that by reason of the second abdication no question of sovereign status did or could arise. What was bothering the lawyers was the question what the answer to a writ of habeas corpus would be. If without an Act of Parliament Napoleon was *and would have remained* a prisoner of war, *cecidisset quaestio*, for a prisoner of war is not entitled to this writ.[4] The upshot was that an Act was passed on 11 April 1816[5] 'for the more effectively detaining in custody Napoleon Buonaparte'; it legalized the detention, provided that he 'shall be treated and dealt with as a Prisoner of War', and contained many supplementary provisions. A second Act,[6] which received the royal assent on the same day, contained, amongst many other provisions, a clause indemnifying all persons concerned in the detention.[7]

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[1] F. L. Maitland, *Narrative of the Surrender of Napoleon* (1826; 2nd ed., 1904), a short and fascinating contemporary account of what we should now call 'Operation Napoleon'; see also *British and Foreign State Papers*, vol. ii, p. 1040.

[2] *Narrative*, p. 131.

[3] Ibid., p. 141.

[4] Ibid., p. 168.

[5] Ibid., p. 165.

[6] It is not clear whether this was a trick to get Napoleon on shore or was due to a bona fide desire to obtain his evidence in an action for libel brought by a naval officer, in which the condition of a French squadron in the West Indies at a certain time was relevant.

[7] *Narrative*, p. 208.

The fact that the following Report was not signed by Sir William Garrow, Attorney-General, does not necessarily mean that he dissented from the King's Advocate and the Solicitor-General; the date is in the Long Vacation; he may have been consulted but not have been available when the Report was ready for signature.

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[1] Yonge, *Life of Lord Liverpool*, vol. ii (1868), p. 198.

[2] Twiss, *Life of Lord Eldon* (1844), p. 277.

[3] Pp. 270–82.

[4] See McNair, *Legal Effects of War* (3rd ed., 1948), pp. 54–60.

[5] 56 Geo. III, c. xxii.

[6] 56 Ibid., c. xxiii.

[7] For the debates on these two Bills, see Hansard, vol. xxxiii (1816), cols. 213, 1012, 1059. In the House of Commons (213) Lord Castlereagh maintained that Great Britain was entitled to detain Napoleon, either as a sovereign prince who had broken a treaty, or as a prisoner of war whose Government had declined to claim him; in the House of Lords (1012) Lord Chancellor Eldon successfully opposed Lord Holland's proposal that the opinions of the Judges should be taken upon a number of points of law relating to alien enemies, prisoners of war, habeas corpus &c.

Drs Commons
16 Augt 15

Sir,

We are favoured with your Letter of the 10th Inst transmitting the Projet of a Treaty[1] respecting Napoleon Buonaparte & desiring that we would report to the Secretary of State our Opinion thereon. In obedience to His Lordships Commands, we have considered the same, & have the honor to report that it is a first object of Treaty between Allied Powers to provide for contingencies that may arise respecting the condition & custody of Prisoners taken in a common war, & that an Interest in a particular Prisoner taken by one of Allied Powers only may be conceded after his surrender if there are no circumstances attending it, that interfere with that right. It is possible that inconvenience may ensue from doing it in the form of treaty proposed—as the recognition of a joint Interest in terms describing him as 'leur Prisonier' may raise difficulties as to the effect of a majority of Interests in the disposal of him, & on other points. A gratuitous permission, that Commissioners might reside, as proposed, 'pour s'assurer de sa presence' would appear to satisfy all claims of right on the part of the Allies. Whether it would be equally suitable to the occasion as the mode proposed, or whether the first & second Articles of the Treaty may be modified so as to avoid the appearance of transferring or recognizing an absolute right, we do not presume to judge, but submit to the consideration of His Majesty's Secretary of State.

We have the honor to be, etc.,
Christ. Robinson
S. Shepherd

J. P. Morier, Esq.

(*d*) *Charles X of France* abdicated on 30 July 1830, and returned to Great Britain, his home during the greater part of the revolutionary period. His creditors got to work quickly.

Abinger.
September 12, 1830.

My Lord,[2]

In obedience to Your Lordship's desire signified to us by a letter from Mr. Backhouse of the 18th inst that we would report our opinion whether the late King of France Charles the tenth is liable to be arrested for debt in this Country, with reference to certain communications made to Your Lordship as well by His Majesty's Ambassador at Paris as by His Grace the Duke of Wellington. We have the honour to inform Your Lordship that we have taken the subject of these communications into our consideration and that we are of opinion that the abdication of Charles the tenth and the recognition by His Majesty of another sovereign upon the throne of France place the right of Charles the tenth to enter and to remain in this Country upon the same footing as that of any other individual being a foreigner, and consequently that he is subject to our Municipal Law and liable to be arrested upon mesne process for debt. We are also of opinion that this liability is not confined to debts contracted in England but extends to debts contracted during his residence in other countries. For although the contract upon which the debt arise must receive its interpretation and efficacy from the law of the country where it was made, the form of procedure for recovering the debt against the debtor in England must be regulated by the law of this Country only.

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[1] Two identical Conventions were signed by Great Britain in Paris on 2 August 1815, one with Austria and the other with Prussia and Russia relating to the custody of Napoleon; whether this Report of 16 August was made after this Convention had been signed and before ratification, or whether it was made on another draft in ignorance of the signature of this Convention, is not clear: see *British and Foreign State Papers*, vol. iii, p. 200, for text.

[2] F.O. 83. 2267: France. See also p. 22 as to the attempt of the Emperor of Brazil in 1828, after abdicating the crown of Portugal, to accredit an ambassador to Great Britain on behalf of his daughter, the Queen of Portugal, purporting to act as her natural guardian.

We have the honour to be, &c.,
Herbert Jenner
J. Scarlett

The Rt. Hon. the Earl of Aberdeen.

(*e*) The events of 1940 had a precedent in 1795 when *William V*, *King of Holland and Prince of Orange*, found refuge in England after his country had been overrun by the French. His immunity as the Head of a foreign state was recognized.

Case for the opinion of His Majesty's Advocate Attorney & Solicitor General.[1]

Baron Nagell having represented to the Right Honourable Lord Grenville one of His Majesty's Secretarys of State that the Magistrates of the County of Middlesex had given orders that the Prince of Orange and his Suite should be Ballotted to serve in the Militia for the said County His Lordship referred such Representation to his Advocate Attorney and Solicitor General for their opinion whether the Prince of Orange is entitled to any Exemption for himself and his Suite from being inserted in the List of persons liable to serve in the Militia and in such case what steps ought to be taken for claiming and enforcing such Exemption. His Majesty's Advocate Attorney and Solicitor General Reported[2] to his Lordship they were of Opinion that his Serene Highness was entitled for himself and his Suite to the Exemption which he claimed and submitted that Government should take upon itself to claim that Exemption on his Serene Highness's behalf by directing some person to attend the Magistrates for that purpose and if the Magistrates should think fit notwithstanding to proceed it must depend on the nature of that proceeding in what manner it is to be resisted or redressed. In consequence of this Report Lord Grenville directed the Solicitor of the Treasury to act agreeable thereto and he in pursuance thereof acquainted Sir William Gibbons one of the Magistrates mentioned in the Representation of Baron Nagell that the King's Advocate Attorney and Solicitor General were of opinion that his Royal Highness the Prince of Orange and his Domestics were by Law exempted from serving in the Militia of this Kingdom and beg that the Magistrates would not suffer the Name of his Royal Highness the Prince of Orange or of any of his Domestics to be ballotted for as persons liable to Serve in the Militia. In answer to Mr. Whites letter Sir William Gibbons writes as follows—

'I am this instant favoured with Your Letter and beg leave to inform you that Baron Nagells representation to Lord Grenville stating that the Magistrates acting in this Division for the County of Middlesex had directed that the Prince of Orange and his Suite should be ballotted for to serve in the Militia was founded on Mistake—no such direction having ever been given—but it is my own opinion, and that of the other Gentlemen who act with me as Magistrates that the Prince of Oranges English Servants should be included in the List returned by the Constable to us. I must beg the favour of knowing whether the Law Officers of the Crown have been consulted on this point, and if they have of such their opinion as I know the List if returned without the names of those English Servants will be appealed from, and unless the responsible authority alluded to above corrects my present opinion I should as Magistrate allow the Appeal.—By the Militia Act Persons refusing to give in their[1] Names of those who reside in their houses are liable to a penalty of ten pounds and it was a complaint of this refusal made by the Constables that called the attention of the Magistrates to the Business.

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[1] F.O. 83. 2291: Holland.

[2] Report of 28 November 1796.

W. Gibbons

> His Majesty's Advocate Attorney and Solicitor General are requested to give their opinion whether the English Servants of His Serene Highness the Prince of Orange should be included in the Lists returned by the Constables to the Magistrates as liable to serve in the Militia of this Kingdom and whether in case of refusal by his Serene Highness to give in the Names of the persons residing in his House he is liable to the penalty of £10 by the Act imposed on persons refusing to give such Names.

We think the English servants of the Prince of Orange are liable to be ballotted, and ought to be included in the lists returned by the constables to the Magistrates as liable to serve in the Militia of this Kingdom; but we think His Serene Highness cannot be personally required to give in the Names of persons residing in his House for such purpose, and cannot be liable to the penalty imposed on persons refusing to do so. At the same time we beg leave to submit whether it may not be proper to request His Serene Highness either to discharge his English servants, or to direct them to deliver their names to the constables.

Wm. Scott
John Scott
John Mitford

9 December 1796.

(*f*) *The ex-Kaiser William II of Germany*. We are not aware of any formal Reports made to the United Kingdom Government by its Law Officers[2] upon the liability of the ex-Kaiser to trial after the First World War. His abdication was made known on 9 November 1918. In January 1919 the Great Powers established a Commission on Responsibilities relating to the War and the Enforcement of Penalties, of which the Attorney-General, Sir Gordon Hewart, K.C., and the Solicitor-General, Sir Ernest Pollock, K.C., were members as alternates. The latter[3] signed a Report dated 29 March 1919,[4] which contained the following among other 'Conclusions':

> All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the law and customs of war or the laws of humanity, are liable to criminal prosecution.

The Commission discussed 'the alleged immunity, and in particular the alleged inviolability, of the sovereign of a State' and refused to recognize it in the sphere of international law. The American representative dissented from this opinion,[1] but added that a sovereign 'who has abdicated or been repudiated by his people' is not in the same position as a reigning sovereign.

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[1] No doubt 'the'.

[2] The Government appointed a 'committee of jurists' to advise them. Sir Frederick Pollock was a member of it: Howe, *The Pollock–Holmes Correspondence*, vol. i (1942), p. 275; and see Birkenhead, *Life of Frederick Edwin, Earl of Birkenhead*, vol. ii (1935), p. 106.

[3] This does not mean that Sir Gordon Hewart dissented, for they were alternates.

[4] *American Journal of International Law*, 14 (1920), pp. 95–126; substantial reservations were made by the representatives of the United States of America.

When the Treaty of Versailles entered into force, the Great Powers demanded that the Netherlands, on whose territory he had found refuge, should surrender the ex-Kaiser for trial. This demand the Netherlands Government rejected on the ground that it would be contrary to their national tradition to surrender a political refugee.[2]

3. *Distinction between public and private character of the Head of a state*

This distinction is so evident, at any rate in our time, that it may seem unnecessary to seek evidence for it.

(*a*) The following is a Report of 31 December 1866[3] upon the annexation of Hanover by Prussia:

Lincolns Inn,
31st December 1866.

My Lords,

We are honored with your Lordship's commands, signified in Mr Hammond's letter of the 18th of Decr 1866, stating that he was directed by your Lordship to ask our opinion on the following matter:

The Kingdom of Hanover has, as we are aware, been annexed by conquest to the Kingdom of Prussia.

That a question is now pending between the King of Prussia and the Ex-King of Hanover, in regard to the amount of compensation to be made by the former to the latter for the private property of the House of Hanover.

That Her Majesty's Government have no knowledge as to the nature and place of deposit of that private property which is to be subject of compensation;—whether it merely consists in property in money, houses, furniture, jewels, pictures, and such like articles, which have fallen into the possession of Prussia on the annexation of the Kingdom of Hanover, or whether under the definition of private property to be surrendered in return for compensation is included property belonging to the House of Hanover, whether invested for a length of time in the English funds, or jewels and other moveable property belonging to the Crown of Hanover and forwarded to this Country for security on the breaking out of the late war, and subject equally with the funded property to family entails.

Mr Hammond was also pleased to state that we should see by the enclosed statement of the family laws of the House of Hanover that The Queen has a contingent interest in the family entails of that House.

That the point therefore on which Your Lordship would be glad to have our early opinion is, whether any steps can be taken, under the circumstances which he had set forth, and which are all that are within Your Lordship's knowledge, to secure the reversionary interests of the Queen in the property now subject to the Family entails, or to the compensation awarded by The King of Prussia to the King of Hanover in lieu thereof; and if so, what those steps should be.

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[1] *American Journal of International Law*, 14 (1920), p. 136.

[2] Part at any rate of the correspondence between the Allied Governments and the Netherlands Government will be found in *Annual Register*, 1920, pp. 254–7, and a Netherlands Orange Book entitled *Mededeelingen van de Minister van Buitenlandsche Zaken aan de Staten-General, Juni 1919–April 1920*.

[3] F.O. 83. 2289: Hanover. See also *Duke of Brunswick* v. *King of Hanover* (1848), 2 H.L.C. 1; *De Haber* v. *Queen of Portugal* and *Wadsworth* v. *Queen of Spain* (1851), 17 Q.B. 171; *Das Königlich Preussisch-Brandenburgische Hausfideikommiss* v. *Administration of South Africa*, South African Law Reports, [1928] South-West Africa 82.

In obedience to Your Lordship's commands, we have taken this matter into consideration, and have the honor to *Report*

That it does not appear from the papers sent to us that Her Majesty has any interest in the question now pending between the King of Prussia and the Ex-King of Hanover except such interest as may be incident to the contingent right of Her Majesty to the Throne and Kingdom of Hanover. The two sets of extracts from the Hanoverian Law of Succession relate entirely to the Throne and Kingdom, except clause 6 of the Laws of 19 Novr 1836, which does not affect the present question. We apprehend that by the *jus victoris* the King of Prussia has a right to at least all property moveable and immovable, which appertained to the Crown and Kingdom and which the Sovereign could not sever from the Crown. We think that, if, following usage which has sometimes prevailed, the Conqueror concedes property to the conquered sovereign or makes him compensation for property taken, the property so restored, or such compensation as may be made, must be deemed to be the free gift of the conqueror, and subject only to limitations which he may think right to impose upon it in the hands of the recipient.

If it should happen that property conceded or compensation granted to the Conquered Sovereign should by the terms of the concession or grant be subjected in his hands to the limitations or entails to which the property given up, or in lieu of which compensation is made, was subject before the conquest, it does not appear from the papers before us that Her Majesty had any interest in such property. It does not follow that the limitations or entails relating to such property would be the same as those relating to the Kingdom.

We think that according to precedent a formal protest against any injury which the annexation of Hanover by Prussia may inflict upon the reversionary interests of Her Majesty or her descendants should be formally made and tendered by Her Majesty's Representative at Berlin to the King of Prussia, and we also think that a claim may be made on the Ex-King of Hanover that property ceded, or compensation awarded to Him, should be held subject to the limitation and entail to which Crown property was subject before the Conquest.

We have the honor to be, etc.,

John Rolt
John B. Karslake
Robt. Phillimore

The Right Honorable Lord Stanley, M.P.

(*b*) The power to accredit diplomatic agents, being a political act, is not exercisable by the natural guardian of an infant monarch.[1]

Doctors' Commons,
October 31st 1828.

My Lord,

We are honoured with your Lordship's commands signified in Lord Dunglas's Letter of the 18th Instant, inclosing a copy and translation of a letter from the Emperor of Brazil to His Majesty, dated July 22nd in which His Imperial Majesty in his character of Guardian of his Daughter, accredits the Marquess of Palmella as Ambassador from the Queen of Portugal to the King of England, and your Lordship is pleased to request that we would take the same into consideration and report our opinion whether the Emperor of Brazil having finally completed his abdication of the Crown of Portugal in favour of his Daughter, as appears from the inclosed Copy of a Despatch and its inclosures from Mr. Gordon, late His Majesty's Minister at Rio de Janeiro, be still entitled in quality of Guardian of his Daughter to grant Letters of Credence in her Name; and consequently whether the Marquess of Palmella ought to be received by His Majesty as the Ambassador from the Queen of Portugal.

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[1] Fo. 83. 2322: Portugal.

In obedience to your Lordships Commands we have the honour to report that we are of opinion that the Emperor of Brazil having finally completed his abdication of the Crown of Portugal in favour of his Daughter, is not entitled in quality of Guardian of his Daughter to grant letters of Credence in her Name. Our opinion is founded upon the principle, which has been acted upon in various instances in the History of our own Country, and which we apprehend to prevail in all other Countries in Europe, that when the Sovereign Authority has devolved upon a Minor the appointment of a Guardian for the exercise of such authority belongs to the Political Government of the Country, and does not vest in the natural Guardian.

We have the honour to be, &c.,
HERBERT JENNER
CHS. WETHERALL
N. C. TINDAL

The Rt. Hon. The Earl of Aberdeen.

4. *The nature of the obligation contracted by a state when borrowing money from individuals*

In the Report of the Law Officers dated 18 January 1753, in what is known as the case of the *Silesian Loan*,[1] it is contended that state loans are governed by an exceptional principle, as the following extract shows:

The King of *Prussia* has engaged his Royal Word to pay the *Silesia* Debt to private Men.

It is negotiable, and many Parts may have been assigned to the Subjects of other Powers. It will not be easy to find an Instance, where a Prince has thought fit to make Reprizals, upon a Debt, due from himself to private Men. There is a Confidence that this will not be done; a private Man lends Money to a Prince, upon the Faith of an Engagement of Honour, because a Prince cannot be compelled, like other Men, in an adverse Way, by a Court of Justice. So scrupulously did *England*, *France* and *Spain* adhere to this Public Faith, that, even during the War, they suffered no Enquiry to be made, whether any Part of the Public Debts was due to Subjects of the Enemy, tho' it is certain many *English* had Money in the *French* Funds, and many *French* had Money in ours.

This Loan to the late Emperor of *Germany*, *Charles* the VIth, in *January* 1734–5, was not a State Transaction, but a mere private Contract with the Lenders, who advanced their Money, upon the Emperor's obliging himself, his Heirs and Posterity, to repay the Principal with Interest, at the Rate, in the Manner, and at the Times in the Contract mentioned, *without any Delay, Demurr, Deduction, or Abatement whatsoever*; and, lest the Words and Instruments made use of should not be strong enough, he promises to secure the Performance of his Contract, *in and by such other Instruments, Method, Manner, Form, and Words, as should be most effectual and valid, to bind the said Emperor, his Heirs, Successors and Posterity*, or as the Lenders should reasonably desire.[1]

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[1] Satow, *The Silesian Loan and Frederick the Great* (1915). See also the following passage occurring in a Report by Dr. James Marriott, of 21 February 1765, printed in Chalmers, *Opinions of Eminent Lawyers of Great Britain*, vol. ii (1814), at p. 355: 'But there is still a more striking instance of all obligations not entirely sinking, in a war, *when the subjects of one government are the public creditors of the other*, and yet these alien enemies preserve the right to their property, *in the public funds of the hostile government*, by the law of nations, *in the midst of war*, without confiscation' (italics in Chalmers).

5. *Sovereignty in relation to the persons and property of subjects*

In a Report,[2] dated 6 May 1776, arising out of the arrest of a British (American) merchant ship at Nieuport, procured at the instance of a British Consul, on the ground of its 'rebellious' character, Marriott made the following observation:

> To the last question how far His Majesty may claim ships, persons and effects of his subjects *when discovered* in foreign parts engaged in the prosecution and support of *rebellious purposes*? It is a very large and new question but to which I answer that by the Law of Nations and the *jus commune* of all Europe all ships and goods of the subject are claimable by the respective Sovereign (as the great universal representative of his people and the fountain of all property and honour) vis-à-vis every foreign Power.

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[1] There are two contentions contained in this extract: (*a*) that a state loan creates moral and not legal obligations, and (*b*) that the obligation, whatever it be, is owed by the head of the state in his personal and not in his public capacity. These contentions evidently carried weight in the year 1753, but I do not think they would do so to-day. The peculiar character of this remarkable Report must also be borne in mind. It is in the form of a Report upon the facts and the law as understood by counsel signing it; it was in fact a reasoned statement of the British case and was immediately communicated to five of the leading European Powers.

In *Twycross* v. *Dreyfus* (1877), 5 Ch.D. 605, 616, Jessel M.R. said: 'The first and most important point we have to decide is what the meaning of the bond of a foreign government [in this case the Peruvian Government] given to secure the payment of a loan is. As I understand the law, the municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign government, or even by the ordinary tribunals of the government which issued them, without the consent of the government of that country.'

That was said in 1877. Since then international arbitration and the judicial settlement of international disputes have developed rapidly. I submit that the obligation created by a bond duly issued by a Government is now a legal one; if the Government chooses to submit to a jurisdiction, judgment can be given against it, which would be impossible if the obligation were only moral. Such a judgment could not be enforced by execution, but the judgment creditor might have a set-off. A contract within the scope of section 4 of the Statute of Frauds will be unenforceable by action if the defendant is in a position to object that there is no memorandum or note in writing, and decides to take that objection; but the obligations created by the contract are none the less legal, not merely moral. For two judgments given by the Permanent Court of International Justice construing and upholding 'gold clauses' in state bonds, see the *Serbian Loans* case, *P.C.I.J.*, Series A, Nos. 20/21, pp. 1–89, and the *Brazilian Loans* case, ibid., pp. 91–155, both in 1929.

It should be pointed out that the Peruvian bonds in question in *Twycross* v. *Dreyfus* contained the expressions 'the national credit of the Republic solemnly pledged', and 'under the national faith', so that it is possible to give the observations of Jessel M.R. a limited interpretation.

[2] F.O. 83. 2279: Great Britain and General. The power of a state over the property of its subjects is illustrated by the provisions of Peace Treaties: see the present writer's *Legal Effects of War* (3rd ed., 1948), ch. 19, 'Effects of Peace Treaties upon Private Rights'.

> Were it otherwise, protection must cease, and with it all sovereignty and all national relation and distinction. To claim the property of the subject at the hands of every friendly State is the *public* right of the Sovereign as the right inherent of his Crown. . . . If any foreign State refuses to deliver up any subjects, their persons, ships or goods, to their own Prince first demanding them, any such Prince in Europe will have a right by the Law and Usage of Nations not only to take them by force wherever he can find them, but if he cannot obtain justice he may make reprisals, as well as establish a like treatment in reciprocity. There is no need to put the previous question 'whether *discovered* to be rebels or not or whether rebellious purposes or tendency to rebellion' [*sic*]. No foreign State or judicature can decide these questions. The persons or effects must be seized first, but tried and convicted afterwards. The first question is, *are they British subjects?* If that subjection is denied and protection is given them against their own Sovereign by his ally, then the alliance ceases *ipso facto*, for they can only be protected on the ground of their being avowed to belong to some other independent body, whose sovereignty by a breach of all public faith and order is thus to be supported against the lawful monarch and the whole national authority and right concentrated in his person. . . .

6. *Liberty of action as to coinage and currency*

Blackstone tells us[1] that 'as money is the medium of commerce, it is the king's prerogative as the arbiter of domestic commerce, to give it authority or make it current', and that 'the coining of money is in all states the act of the sovereign power'.

(*a*) Harding on 7 March 1856 advised that[2]

> Abstractedly and as a general principle of international law, the right of a Government to regulate the affairs of its Mint and coinage, to fix whatever legal metallic standard or tender it pleases, and more especially to charge whatever it may think fit for coining silver or other metals without being subject to the interference of foreign States, cannot in my opinion be questioned. . . .

(*b*) *Kossuth Bank Notes*. On 15 February 1861[3] Sir Richard Bethell and Sir William Atherton advised the Crown that

> the making and issuing of the Notes in question to Kossuth under the circumstances and for the purpose stated in the Case [namely, 'raising money to be employed in overthrowing the Austrian Government in Hungary, and establishing there a new and independent State'] do in the theory of the Law amount to an indictable misdemeanour. We say in the theory of the Law, because there is no instance of any decision to such effect. . . .[4]

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[1] *Commentaries* (1765), vol. i, pp. 276, 277.

[2] F.O. 83. 2341: Sicily. The bearing of this upon devaluation is an interesting speculation.

[3] F.O. 83. 2231: Austria. See two Reports by Christopher Robinson of 28 January and 31 May 1819 in F.O. 83. 2332: Russia, upon a request by the Russian Ambassador for some protection of Russian paper currency against counterfeiting in the United Kingdom.

[4] See *Emperor of Austria* v. *Day and Kossuth* (1861), 2 Giffard 628 (a decision containing much of interest upon the status of foreign States and their Heads), at p. 678: '. . . the regulation of the coin and currency of every State is a great prerogative right of the sovereign power. . . . Money is the medium of commerce between all civilized nations; therefore, the prerogative of each sovereign State as to money is but a great public right recognized and protected by the law of nations . . .' (*per* Vice-Chancellor Sir John Stuart); the decision was affirmed, 3 De G.F. and

At the same time they advised strongly against a prosecution.

> It is most certain that any such prosecution would be odious, and the defence most popular . . . there would be no chance of obtaining a verdict of guilty against the Defendant.

(*c*) In another case Harding reported as follows:[1]

Doctors' Commons,
April 14th 1858.

My Lord,

I am honoured with Your Lordship's commands signified in Mr. Hammond's letter of the 22nd March Ultimo, stating that he was directed to transmit to me a despatch from Mr. Hood, Her Majesty's Consul at St. Domingo, enclosing copies and translations of two decrees issued by the Provisional Government at Santiago, and by the Congress at Moca, prohibiting the introduction of the Paper Money issued by the Government of St. Domingo, and refusing to acknowledge the authority of President Baez to obtain money in the public Credit; and to request that I would take these papers into consideration, and report to Your Lordship my Opinion as to whether the Provisional Government at Santiago would have a right to destroy the Paper Money in question which might be found in the hands of Neutrals.

In obedience to Your Lordship's commands I have taken these papers into consideration and have the honour to *Report.*

That assuming the Provisional Government to be a Government 'de facto' whose existence is recognized by Her Majesty's Government, and which is established in complete possession of Legislative and Executive power within certain Territorial limits, and engaged in a civil war with the Government of President Baez, I am of Opinion that it would have a right to carry out the Decree or Law in question, and to inflict the Penalties therein denounced against Neutrals who might knowingly infringe its provisions, by illegally introducing into the Territories of the Provisional Government the Paper Money issued by President Baez, whose power to issue such Money is denied by the Provisional Government to this extent therefore Your Lordship's question must in my Opinion be answered in the Affirmative.

Each 'de facto' Government engaged in a Civil War is 'prima facie' a regular Government in relation to those Foreign Nations, who remain Neutral, and is entitled, as such, to exercise complete Sovereign authority within the Territory actually in its power. The regulation of the currency and the forbidding the uttering or circulation of certain kinds of paper money under certain penalties (especially as to the paper money of hostile Powers during civil war), appears to me to be within the Sovereign authority ordinarily exercised by, and as it were incidental to regular Governments.

I observe moreover that Mr. Hood makes no remarks on the probable operation of the Decrees in question, and does not point [to] any peculiar injustice or hardship which they are likely to cause to British Subjects.

I do not therefore (as at present advised) see any necessity for the interference of Her Majesty's Government.

I have the honour to be &c.,
J. D. Harding

The Rt. Hon. The Earl of Malmesbury.

J. 217, but the grant of the injunction is definitely based on injury to the property of the foreign sovereign and of his subjects, and not upon any threatened invasion of his prerogative as a reigning sovereign.

[1] F.O. 83. 2262: Dominica.

7. *Criminal libel upon Heads of foreign states*

(*a*) The King of Denmark having complained through his Minister in London of a scandalous and indecent paragraph contained in the *London Chronicle*, the matter was referred to the Attorney-General (Charles Yorke), who reported, 22 July 1762:[1]

> That scandalous and injurious reflections published in derrogation of the Honour and Dignity of Foreign States and Princes in Amity with his Majesty may be punished criminally by Information or Indictment as libel, because such Reflections tend to interrupt the Harmony and Confidence which subsists between the Crown of Great Britain and its Allies. . . .

He added that the Danish Minister might find 'a personal Submission from the Offenders, accompanied with a Recantation and Apology in a Subsequent Paper' more agreeable than a trial before a judge and jury!

(*b*) The following Report[2] relating to an alleged libel upon a former Grand Master of the Order of St. John of Jerusalem indicates the basis of the protection of Heads of foreign states from libellous attacks to be the safeguarding of good relations with them:

Lincoln's Inn,
December 4th 1779.

My Lord,

I am honoured with Your Lordship's Letter of the 26th of November, transmitting a Copy of a Letter which Your Lordship had received from Baron de Hompesch, Lieutenant General in His Majesty's Service, complaining of a Libel which appeared in the Newspaper called 'The Times' against his Uncle the late Grand Master of the Order of St. John of Jerusalem; and requiring me to take the case into my consideration, and report to Your Lordship my opinion thereupon, for His Majesty's information.

I have considered the paragraph referred to and under the circumstances in which I apprehend the late Grand Master of the Order of St. John of Jerusalem stands, I can find no ground upon which I can venture to say that the paragraph would be deemed a libel, punishable as such by the Laws of this Country. If there exist political relations between His Majesty and the late Grand Master of the Order of St. John of Jerusalem which are important to the interests of this Country, if those relations can be shown to have been matter of notoriety, and it can also be shewn that those relations might have been materially affected, to the injury of this Country, by the paragraph in question, I think it might have been possible to have put on record a case which a Court of Justice might have deemed a case of Libel. I am wholly ignorant of the existence of any such relations and if they did exist, and were notorious, yet considering the impunity with which Paragraphs respecting princes acknowledged as

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[1] H.O. 49, 1, p. 30. Not infrequently Heads of foreign states have found it difficult to understand the degree of licence permitted to the Press in this country and have lodged complaints of this character. See F.O. 83. 2232: Bavaria, under date 20 August 1850, and a long note attached to Oppenheim, *International Law*, vol. i (6th ed., 1947), § 121; a note in Forsyth, *Cases and Opinions on Constitutional Law* (1869), p. 236; and *R.* v. *Lord George Gordon*, 22 State Trials 213 (libel on the Queen of France), *R.* v. *Vint*, 27 State Trials 627 (libel on the Emperor Paul of Russia), and *R.* v. *Peltier*, 28 State Trials 617 (libel upon Napoleon Buonaparte as First Consul).

[2] F.O. 83. 2301: Malta.

Sovereigns by all Europe, and with whom his Majesty has been known to be in strict alliance, have been, for many years past, continually inserted in the public papers, I should have little expectation that a Jury would find a Defendant guilty upon an information for a libel upon a person standing in the situation of the late Grand Master of the Order of St. John of Jerusalem. In those cases [in] which his Majesty has been advised to order prosecutions for Libels on foreign princes, which have come within my knowledge, the order has, I apprehend, been founded on complaint by the accredited Minister of the injured party residing at this Court; and the officers of the Crown whose duty it has been to state such cases to a jury, have been enabled to say, that such complaint has been so made, and to state it to shew that the prince libelled has appealed to the justice of this Country for redress of the injury done to him. The Baron De Hompesch, I apprehend is a mere individual in His Majesty's Service; and his complaint could not, I conceive, be stated in a Court of Justice as affording any sanction to a prosecution for a Libel on his Uncle. If he should be advised that his Uncle, as an individual, has been so injured that he has a right to seek for him, in that Character, redress from the Laws of this Country, I apprehend he may so do by preferring an Indictment against those whom he may be advised to make the objects of such prosecution.

If, however, there are reasons for giving attention to this complaint of Baron de Hompesch which do not exist in the case of other individuals, and which may induce a wish that the case should be further considered, I must request that Your Lordship would have the goodness to favour me with the Grounds on which the case is to be so distinguished from other cases of individuals resident in foreign Countries who may be reflected upon in the public papers; and I also request that upon a case which must then be considered as standing under extraordinary circumstances, I may have the assistance of His Majesty's Solicitor General.

I have the honour to be &c.,[1]

The Rt. Hon. Lord Grenville.

(*c*) To which may be added a Report upon liability for incitement to assassinate a foreign monarch.

In *re* "To-Day" newspaper of 6th June, 1896.

COMPLAINT OF TURKISH AMBASSADOR.

Opinion of the Law Officers of the Crown.[2]

WE do not think that a Government prosecution in this case is advisable.

A libel upon a foreign Sovereign may undoubtedly form the subject of an indictment or a criminal information. But in the present case the attack upon the Sultan is mainly with reference to his public conduct in connection with the Armenians, and, in our opinion, it would be very improbable that a conviction could be obtained upon a prosecution for libel in respect of these paragraphs.

A graver question arises upon the suggestion contained in one of these paragraphs that the Sultan should be assassinated.

Inciting to murder any person, whether a subject of Her Majesty or not, is an offence both at Common Law and under 24 and 25 Vic., cap. 100, S. 4; and the case of Reg. *v.* Most (7 Q.B.D. 244) shows that the offence may be committed by the publication of a newspaper article, although the incitement is not directed to any person in particular.

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[1] The signature is missing. Probably the writer was Sir Alexander Wedderburn, A.G., later Lord Chancellor Loughborough. See also F.O. 83. 2364: Spain, for a Report by Thomas Plumer of 27 September 1808 upon the question of a prosecution of those responsible for an alleged libel upon the King of Spain and his Government, a Report by Garrow and Shepherd of 18 March 1815 in the same volume, and Reports by Robinson, Shepherd, and Giffard of 7 October and 3 December 1818 in F.O. 83. 2365: Spain. The Law Officers have frequently commented upon the difficulty of securing a verdict from the jury and have advised against a prosecution.

[2] Turkey.

If the paragraph in question can be regarded as seriously inciting the Armenians to kill the Sultan, the publisher would undoubtedly be punishable for inciting to murder. But upon the whole we think, having regard to the fact that the publication is in English and took place in England, that a jury would come to the conclusion that the paragraph is rather a very forcible expression of the abhorrence which the writer appears to entertain for the Sultan, than a serious incitement to his murder. It would not probably be read by any persons who would be likely to be affected by it.

These paragraphs are undoubtedly in the worst possible taste, but we do not think that any proceedings can be taken upon them with reasonable prospect of success.

RICHARD E. WEBSTER
ROBERT B. FINLAY

June 23, 1896.

8. *The effect of ostensibly sovereign acts on the part of private individuals or chartered corporations*[1]

(*a*) Whether a British subject can hold independent foreign sovereignty: the strange case of Rajah Brooke of Sarawak.[2]

(*b*) Occupation of territory by subjects.

(*c*) Acquisition of territory as a result of conquest by, or cession to, subjects.

(*a*) *Rajah Brooke of Sarawak*[3]

The cession, in or about the years 1846 to 1853, by the Sultan of Borneo to James Brooke of the territory known as Sarawak raised the question whether it is possible for a British subject to acquire the status of an independent sovereign. This is a mixed question of international and British constitutional law. The question was put to the Law Officers by the Foreign Office in the following abstract form:[4]

December 12, 1853.

Gentlemen,

I am directed by the Earl of Clarendon to request that you will report to him your opinion whether it is legal for a British subject to accept or assume the independent sovereignty of a foreign State.

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[1] See the following chapters in Lindley, *Acquisition and Government of Backward Territory* (1926): XI. Individuals, XII. Corporations.

[2] See Lindley, op. cit., pp. 86–8; Smith, *Great Britain and the Law of Nations*, vol. ii (1935), pp. 83–96.

[3] See Smith, op. cit., p. 83, where there will be found in addition to the Report of 9 January 1854 extracts from the proceedings of the Commission (Parliamentary Papers, Cd. 1976) which inquired into the position of Rajah Brooke and the Memorandum of 1876, prepared by Sir Edward Hertslet of the Foreign Office. See also *Duke of Brunswick* v. *King of Hanover* (1848), 2 H.L.C. 1.

[4] F.O. 83. 2235: Borneo. As to the Order in Council directing an inquiry, see Reports of 24 May, 4 August, and 14 December 1854, and 11 February 1855 in the same volume.

To this question the Law Officers made the following reply:

Doctors' Commons,
January 9th 1854.[1]

My Lord,

We are honoured with Your Lordship's Commands signified in Lord Wodehouse's Letter of the 12th ultimo stating that he was directed to request that we would report to your Lordship our opinion, whether it is legal for a British Subject to accept or assume the independent Sovereignty of a Foreign State.

In obedience to your Lordships Commands we have the honour to *report*

That, the question is one which in an abstract form, can hardly be answered satisfactorily.

We should have been glad if the particular case which has given rise to the question had been specifically stated.

Sovereignty may be acquired by a Subject in four different ways.

First, by conquest,
Second, by occupancy,
Third, by Election,—and
Lastly, by descent.

In the two first cases a British subject acquiring dominion over a Country, or its Inhabitants acquires such dominion solely and entirely for the Crown. To assume Sovereignty in his own right over a Country so conquered, or occupied, would be in a British Subject, illegal as being a direct violation and invasion of the rights and prerogatives of the Crown.

The case of Sovereignty assumed by a Subject in consequence of being elected King by an Independent people must be considered as falling under the same rule, for the assumption of Sovereignty so derived involves the assumption of independent absolute power, and a renunciation of that allegiance to his own Sovereign which no British Subject can put off. Such an assumption of Sovereignty might be treated as an offence at Common Law; at all events it would be absolutely invalid, and a Subject assuming Sovereignty under such circumstances would acquire no right to be recognized or treated as a Sovereign by the Government of Great Britain, and in the event of his levying War on the Sovereign of these Realms, or, doing any other act at variance with his Natural allegiance as a British Subject, his acquired position would be no protection, but he would be subject to the penal consequences of such acts, if opportunity of enforcing the Law of this Country should occur.

None of these considerations apply to the case of a British Subject assuming Sovereignty with the assent and concurrence of the Sovereign and Government of his Country, such as were the present case of the present King of the Belgians and the King of Hanover, and who unquestionably retained, and probably can transmit to their Children, the rights and privileges of British Subjects.

Another exception must also, we think, be made in the case of Persons who may be said to be Subjects of this Country by accident,[2] such as the children of Foreigners born during the sojourn of their Parents in this Country;[2] such persons by virtue of their Birth would be entitled to the rights of British Subjects, but they may adopt and follow the Country of their Parents, and if they do so, they would owe no allegiance to the Crown of Great Britain.

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[1] F.O. 83. 2292: Holland. For some reason not clear to me this Report occurs in a volume relating to the Netherlands; possibly the question arose out of some contact with Dutch Borneo. The letter from the Foreign Office of 12 December 1853 is to be found in F.O. 83. 2235: Borneo.

[2] Punctuation altered to make sense.

In the remaining case, namely that of British Subjects acquiring Sovereignty by descent, it is, we think, clear that the rule as to the indefeasibility of allegiance must again submit to exception, for in such a case as the Subject *succeeding* by the Law regulating the descent of the Sovereign power in such foreign country, the people of such country would have a right by the Law of Nations to have its ruler recognized as a lawful independent Sovereign.

Of course no question could arise when the subject so inheriting succeeds with the concurrence of his Natural Sovereign.

The answer, therefore, to the general question submitted to us may be thus expressed. The assumption of Sovereignty by a Subject is illegal unless made expressly or impliedly with the consent of the Sovereign.

We have the honour to be &c.,
J. D. Harding
A. E. Cockburn
Richard Bethell

The Rt. Hon. The Earl of Clarendon.

Doctors' Commons,
February 18, 1854.[1]

My Lord,

We are honoured with Your Lordship's commands signified in Lord Wodehouse's letter of the 21st ultimo stating that in our Report of the 9th ultimo on the question whether it be legal for a British subject to accept or assume the independent Sovereignty of a Foreign State we stated that that question was one which in an abstract form can hardly be answered satisfactorily, and that we should have been glad if the particular case which has given rise to the question had been specifically stated. Lord Wodehouse was directed to submit to us the following circumstances out of which the question has arisen. That the attention of Her Majesty's Government having for some time past been drawn to certain anomalies in the position held by Sir James Brooke Her Majesty's Commissioner and Consul General in Borneo, it was in the course of last year deemed expedient that an inquiry should take place in respect to these matters and that this inquiry should be conducted under the authority of the Governor General of India in Council. That one of the principal anomalies above alluded to arose from a claim recently put forward by Sir James Brooke to be considered by virtue of certain possessions held by him originally under the Sultan of Borneo, but now as he states independently, as one of the independent Rajahs of that Country.

That in the letter addressed by your Lordship to the President of the India Board stating the objects of the inquiry, and the nature of the instructions to be given to the Commissioners who were to conduct it, your Lordship stated that 'by no Act of Her Majesty's Government has countenance ever been given to Sir James Brooke's assumption of independence, and that his possession of Sarawak has never been considered otherwise by them than as a private grant bestowed by a Foreign Sovereign on a British Subject.'

That this letter having been presented to Parliament, and having thus come to the knowledge of Sir James Brooke, a letter has now been received from him, which is therewith enclosed, referring to the several communications which have passed between him, and His Majesty's Government and which in his (Sir James Brooke's) opinion afford their countenance to the assumption by him of the character of an independent Sovereign.

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[1] F.O. 83. 2235: Borneo.

Lord Wodehouse was likewise pleased to enclose a Memorandum which has been drawn up at the Foreign Office with reference to the statements and arguments of Sir James Brooke, together with several papers therein referred to; and Lord Wodehouse is pleased to request that we would take the whole of these papers into consideration, and report to Your Lordship at our earliest convenience our opinion whether there is anything in the communications which have passed between Her Majesty's Government and Sir James Brooke which would afford the latter just ground for considering that the necessary sanction of Her Majesty's Government for assuming the independent Sovereignty of Sarawak had been obtained and whether, under the circumstances stated, Sir James Brooke can be considered as legally holding such Sovereignty.

In obedience to your Lordship's Commands we have taken these Papers into consideration, and have the honour to report,

That we are of opinion that there is not anything in the communications which have passed between Her Majesty's Government and Sir James Brooke which would afford the latter sufficient legal grounds for considering that the necessary sanction of Her Majesty's Government for assuming the independent Sovereignty of Sarawak had been obtained; and, we are further of opinion that under the circumstances stated, Sir James Brooke cannot be considered as legally holding such Sovereignty. It does not, however, appear to us that Sir James Brooke claims to have been recognized by Her Majesty's Government as an independent Sovereign; he distinctly disclaims 'having on any occasion assumed a personal independence,' but, he contends, and we think not without reason, that he was recognized by Her Majesty's Government as occupying more than a private position, and as governing the country by authority derived from, and exercised under, the Sultan of Borneo.

We have the Honour to be &c.,
J. D. HARDING
A. E. COCKBURN
RICHARD BETHELL

The Rt. Hon. The Earl of Clarendon.

Doctors' Commons,
August 17th 1855.

My Lord,[1]

We are honoured with Your Lordship's commands signified in Mr. Hammond's letter of the 31st July last stating that he was directed to transmit to us therewith the Reports made by Mr. Prinsep and Mr. Devereux, the Commissioners appointed to enquire into certain matters connected with the position of Sir James Brooke, Her Majesty's Commissioner and Consul General in Borneo, together with the papers which accompanied those Reports also the former papers relating to this subject; Mr. Hammond was also pleased to call our attention to that part of the Memorandum of Mr. Devereux inclosed in his letter of the 11th of January to the Secretary to the Government of India, in which he states that 'without a knowledge of the contents of the Document containing the Grant or Cession of Sarawak to Sir James Brooke, the dependence or independence of that Territory cannot be ascertained;' and to acquaint us that Sir James Brooke has resigned his Post of Her Majesty's Commissioner and Consul General in Borneo and that it is the intention of Her Majesty's Government to appoint an Agent in the place of Sir James Brooke with the rank of Consul General.

And Mr. Hammond was further pleased to request that we would take all the enclosed papers into consideration, and that with reference to the protection of the Interests of British Subjects in Sarawak we would report to Your Lordship our Opinion as to whom Her Majesty's Government should apply to for an 'Exequatur' or a Recognition of Her Majesty's Consul General to enable him to act in Sarawak in that capacity.

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[1] F.O. 83. 2235: Borneo.

In obedience to Your Lordships commands we have taken this subject into consideration and have the honour to *Report*, That we are of Opinion that Her Majesty's Government should apply to the Sultan of Borneo for an 'exequatur' or a recognition of Her Majestys Consul General to enable him to act in Sarawak in that capacity. The Sultan has been recognized by Her Majesty's Government as the Sovereign of Borneo. Even if Sarawak, originally a portion of Borneo, is now practically independent the original Grant or Cession from the Sultan (under which document only the Rajah of Sarawak appears to us to be legally constituted the immediate ruler of that territory) does not expressly confer upon him any Authority as an independent and Sovereign power. The Rajah is moreover a British Subject by birth and was until recently in Her Majesty's Service, and has never been hitherto recognized by Her Majesty's Government as an independent Sovereign, and we do not consider that he can properly be so recognized in this instance.

We have the honour etc.,
J. D. Harding
A. E. Cockburn
R. Bethell

The Rt. Hon. The Earl of Clarendon.

Doctors' Commons,
January 19th 1856

My Lord,[1]

We are honoured with your Lordship's commands signified in Lord Wodehouse's letter of the 4th January instant, stating that he was directed to transmit to us a despatch dated the 27th of October from Mr. St. John, Her Majesty's Consul General in Borneo inclosing the minutes of a conversation with the native members of the Council of Sarawak on the subject of the independence of Sarawak, and the Jurisdiction to be exercised over British subjects within the Sarawak Territory and also enclosing a Memorandum delivered by Sir James Brooke, the Rajah of Sarawak, to Mr. St. John, stating that it will be requisite for him previously to undertaking the duties of Consul General to receive an Exequatur from the Government of Sarawak. Mr. St. John in the same despatch expresses his own views as to the best mode of exercising jurisdiction over British Subjects in the dominions of the Sultan of Borneo, as well as in the Territory of Sarawak.

Lord Wodehouse further transmits a despatch from Mr. St. John, dated November 3rd explaining more fully his views as to the independent position of Sarawak.

That with respect to the question of jurisdiction our Report of June 26th[2] is annexed, together with despatches to Mr. St. John, informing him that in consequence of his objections the order in Council which had been issued as to that jurisdiction, had been annulled, and desiring him to report his opinion as to the best mode of exercising such jurisdiction.

That with respect to the question of the Exequatur, and the independence of Sarawak, our Reports of February 18th 1854, and August 17th 1855, are annexed together with a despatch which was addressed by Your Lordship to Mr. St. John on September 6th on this subject. Lord Wodehouse refers us to the Report of the Commissioners of Inquiry regarding Sir James Brooke (transmitted to us) and especially to the minute of Mr. Devereux on the subject of the position of Sir James Brooke at Sarawak at page 12 of the Report.

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[1] F.O. 83. 2235: Borneo.

[2] F.O. 83. 2235: Borneo, 26 June 1855, which relates to the exercise of civil and criminal jurisdiction over British subjects within the territory of the Sultan of Borneo.

Lord Wodehouse is pleased to request that we would take these papers into consideration and report to your Lordship our opinion, *First* as to whether it will be proper for Her Majesty's Government to recognize the independence of Sarawak, or to direct Mr. St. John to apply to the Government of Sarawak for an Exequatur and, *Secondly*, as to the propriety of carrying out the plan suggested by Mr. St. John for making arrangements for the exercise of Jurisdiction over British Subjects at Bruné, and at Sarawak.

Lord Wodehouse is pleased to add that Her Majesty's Government are not in possession of copies of the Deeds ceding Sarawak to Sir James Brooke, which are stated to have been executed by the Sultan of Bruné in 1846, and 1853, and which are alluded to by Mr. St. John in his despatch of November 3rd.

A memorandum is annexed which has been drawn up in the Foreign Office, showing that the only document granting Sarawak, which has been communicated to the Foreign Office is the deed dated 1843, a translation of which was received from the Admiralty which will be found in the printed correspondence 'Confidential Papers' respecting Borneo 1844–1847, p. 4 (inclosed).

And Lord Wodehouse is pleased to request that we would report to your Lordship at our early convenience.

In obedience to your Lordship's commands we have taken the papers into consideration and have the honor to *report*,

That we assume that the Rajah by insisting upon Mr. St. John's receiving an 'Exequatur' from him in effect contends that he is an independent Sovereign. If this be so, we are of opinion that Her Majesty's Government by allowing Mr. St. John to accept such 'Exequatur' would practically acknowledge such independent Sovereignty. As to how far a British Subject can acquire the character of an independent Sovereign we beg to refer to our Report of January 9th 1854. We see no objection to Mr. St. John's plan for the Establishment of a Court of Judicature in Bruné.

We have the Honor etc.,
J. D. HARDING
A. E. COCKBURN
RICHARD BETHELL

The Rt. Hon. The Earl of Clarendon, K.G.

Doctors' Commons,
February 15th 1856.

My Lord,[1]

We were favoured with Your Lordship's Commands, signified in Lord Wodehouses letter of the 23rd ultimo, in which he stated, that with reference to that portion of our report of the 19th ult. in which we state, that, 'As to how far a British Subject can acquire the character of an Independent Sovereign, we beg to refer to our report of January 19th[2] 1854,' he was directed to retransmit to us the papers upon the Subject, and to state that Your Lordship would be glad to be favoured with our Opinion, whether with reference to those papers, and to our report above mentioned of January 19th[2] 1854 upon the general question of the legality of a British Subject accepting or assuming the independent Sovereignty of a Foreign State, we are of Opinion that it would be proper for Her Majesty's Government to recognize Sir James Brooke, being a British subject, as independent ruler or Sovereign of the Foreign State of Sarawak.

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[1] F.O. 83. 2235: Borneo.

[2] This should be 'January 9th, 1854'.

In obedience to Your Lordship's Commands, we have perused the papers, and have the honour to Report that the question, whether it would be proper for Her Majesty's Government to recognize Sir James Brooke, as independent ruler or Sovereign of the Foreign State of Sarawak appears to us to be entirely a question of Policy for the consideration of the Government.

As a question of constitutional law we are of Opinion that it is legally competent to Her Majesty to permit one of Her Subjects to assume the Sovereignty of a Foreign state, and to recognize him as such. Without such permission from the Crown, a Subject cannot acquire independent Sovereignty; the latter position being inconsistent with the allegiance which he owes to his own Sovereign, and which without the consent of that Sovereign he cannot put off.

It will at once be felt that so important and fundamental a principle, ought not, unless under very special circumstances, to be departed from. Whether Her Majestys Prerogative should be exercised in the particular case is matter for the determination of the confidential Advisers of the Crown.

We have the honor etc.,
J. D. Harding
A. E. Cockburn
Richard Bethell

The Rt. Hon. The Earl of Clarendon, K.G.

Temple,
October 11th 1862.

My Lord,[1]

We are honored with Your Lordship's commands signified in Mr. Hammond's letter of the 11th September ult. stating that he was directed by Your Lordship to transmit to us a letter from Mr. John Abel Smith, [dated the 4th September, 1862] containing a statement prepared for the purpose of being submitted to Counsel on behalf of Sir James Brooke, with a view to ascertain whether there exists any legal or constitutional objection to the appointment of a British Consul at Sarawak.

Mr. Hammond added that the various questions which have arisen in connection with Sir James Brooke's position at Sarawak have formed the subject of the correspondence and confidential Memoranda contained in the volumes therewith inclosed for our information, and he also inclosed a Memorandum as to the bearing of Treaty stipulations on the matter, and requested that we would take these Papers into our consideration, and that we would report to Your Lordship our opinion on the following points.

1. Supposing Her Majesty's Government to be willing or desirous to send a Consul to Sarawak, does there exist any legal or constitutional ground against applying to Sir James Brooke as Sovereign of Sarawak for an Exequatur?

2. Does [*sic*] there exist any Treaty stipulations between this Country and the Netherlands or any other Foreign Government which precludes such recognition of Sir James Brooke as Rajah of Sarawak?

We are also honored with Your Lordship's commands signified in Mr. Hammonds letter of the 29th September ultimo, stating that he was directed by Your Lordship to transmit to us a Despatch and its inclosures from the Earl of Elgin respecting Sarawak, [dated the 16th August, 1862] in order that they might be taken into consideration together with the papers which were referred to us in his letter of the 11th September on this subject.

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[1] F.O. 83. 2235: Borneo.

In obedience to Your Lordship's commands, we have taken these questions into consideration and have the honor to *Report*

That (1) We agree with the opinion expressed by the Law Officers of 15th February 1856 in which they say: 'As a question of constitutional Law we are of opinion that it is legally competent to Her Majesty to permit one of Her Subjects to assume the Sovereignty of a Foreign State and to recognize him as such', and we think that there does not exist any legal or constitutional ground against applying to Sir James Brooke, as Sovereign of Sarawak, for an Exequatur to a Consul sent by Her Majesty to Sarawak.

2. We do not find in the Treaty stipulations between Great Britain and the Netherlands or any other Foreign State any obstacle to the recognition of Sir James Brooke as Rajah of Sarawak.

We have the honor etc.,
WM. ATHERTON
ROUNDELL PALMER
ROBERT PHILLIMORE

The Rt. Hon. The Earl Russell, K.G.

The immunities of the public ships and other property of foreign states will be more conveniently dealt with under the title 'Jurisdiction', but it is appropriate to print the following Report relating to Sarawak here.

The Law Officers of the Crown to Colonial Office.

Sir, *August* 1, 1901.

WE were honoured with your commands, signified in Mr. C. P. Lucas' letter of the 15th June last, stating that he was directed by you to forward, for our consideration, a letter from Sir Charles Brooke, G.C.M.G., Rajah of Sarawak, and to request the favour of our report upon certain questions of international law arising out of the circumstances described in that letter.

That Sir Charles Brooke asked for compensation for the action of the local representatives of the British North Borneo Company in Labuan in seizing opium on board the Sarawak Government steamer the 'Lorna Doone', and detaining the vessel and its captain under section 9 of the Labuan Ordinance No. 2 of 1873.

That Mr. Lucas was to say that, in order to prevent the recurrence of seizures of this kind in future, you were giving instructions to the British North Borneo Company to have the Labuan Ordinance amended so as to exclude from its operation the case of a steamer merely calling at Labuan, but carrying opium consigned to another port.

That leaving the local law, therefore, out of the question, Mr. Lucas was to point out that the Rajah's claim for compensation would appear to you to depend upon the international *status* of Sarawak, as modified by the Agreement of the 14th June, 1888, whereby that country was placed under British protection.

That you were doubtful as to whether the 'Lorna Doone' could be considered a public ship of a sovereign independent State, and, as such, entitled to exterritoriality.

That if Sarawak was to be looked upon as a sovereign or 'semi-sovereign' State as regards the possession of public ships, it appeared to you that the formal statement of the Rajah that the 'Lorna Doone' was such a ship was final, and that His Majesty's Government, no less than a Court of Law, would, on the authority of the 'Parlement Belge' (L.R. 5 P.D., p. 219, and cases therein referred to), be bound to accept that statement without further inquiry.

That if, on the other hand, the status of Sarawak could be regarded as approximating to that of a protected native Indian State, it would clearly have no international personality at all, and would therefore be incapable of possessing 'public vessels' *stricto sensu.*[1]

That the matter was laid before the Secretary of State for Foreign Affairs in a letter from the Colonial Office, dated the 10th May, 1901, and that a copy of Mr. F. H. Villiers' letter in reply was inclosed for our information.

That Mr. Lucas was accordingly to request us to be good enough to report:—

1. What was the international status of Sarawak?

2. Was the 'Lorna Doone' entitled to exterritoriality at Labuan as a 'public ship'?

3. If not, was the Rajah entitled upon any other ground to compensation?

And further that, as it was believed that there was little authority or precedent upon the question of the rights of public vessels of protected States, Mr. Lucas was to ask us to favour you with a report upon the following questions:—

4. Was the public ship of an independent State under British protection entitled to the full rights of exterritoriality enjoyed by the public ships of ordinary sovereign States?

5. If not, was such a ship entitled to any limited form of exterritoriality, as, for example, in British waters, or in foreign waters, or how otherwise?

6. Or was such a ship entirely divested of its exterritorial character by the circumstance of its State being under British protection?

We have taken the matter into our consideration, and, in obedience to your commands, have the honour to

Report—

1. That as between Sarawak and His Majesty's Government, under the Treaty, Sarawak is entitled to be recognized as an independent State subject only to the limitations mentioned in the Treaty.

2. It follows from the above that His Majesty's Government ought to recognize the 'Lorna Doone' as a 'public ship.'

3. Does not arise.

4. We think this question could be only usefully answered upon a consideration of the circumstances of any particular case in which it may arise. As the foreign relations of Sarawak are under the control of His Majesty's Government, it will be for the Government to determine in any particular case how far such a claim should be asserted.

5 and 6. We do not think that such a ship can be regarded as entirely divested of its exterritorial character, and, as already advised, we think that it ought to be treated as a 'public ship' in British waters.

We have, &c.
R. B. FINLAY
EDWARD CARSON[2]

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[1] This requires a word of explanation. There are many decisions of English courts which show that, as a matter of British constitutional law and not of international law, many protected states within the British Empire and their Heads enjoy in British courts a degree of state immunity analogous to, or identical with, that accorded in pursuance of international law to truly foreign independent states and their Heads. So it must not be inferred that, merely because a state or its Head is granted by British courts the immunities customary in the case of foreign states and their Heads, such a state possesses international personality. The following are some of these decisions: *Mighell* v. *Sultan of Johore,* [1894] 1 Q.B. 149; *Statham* v. *Statham and the Gaekwar of Baroda,* [1912] P. 92; *Duff Development Co.* v. *Government of Kelantan,* [1924] A.C. 797.

[2] This Report (which is indexed under Borneo) was reaffirmed on 11 August 1902 with the

The two following Reports may be appended to the Reports on Rajah Brooke.

Doctors' Commons,
17th April 1815.[1]

May it please Your Lordship,

We are honoured with Your Lordships Commands signified in Mr. Hamilton's Letter of the 20th February 1815 referring to Our former report respecting the Claims of Captain Folville to be considered as a British subject; and transmitting a Dispatch from Lord Fitzroy Somerset, together with its Inclosure, containing further Information respecting the grounds on which the Claim in question is supported.—

And Your Lordship is pleased to request that we would take the same into Consideration and report to Your Lordship Our Opinion thereof.

In Obedience to Your Lordship's directions, We have considered the same and have the Honour to report, that We do not perceive any thing in these further Papers which should induce us to alter the opinion submitted in the report of the 18th November 1814.

The grant of the privileges of Sovereignty to the Duke de Bouillon and his Descendants in 1651 is not we conceive inconsistent with the implied reservation of the Duties of natural Allegiance owing by Subjects to their Sovereign—And We are confirmed in that Opinion by observing in the History of the Events which led to the surrender of Sedan to the Crown of France in the 17th Century that Frederick Duke de Bouillon when in possession of the actual Sovereignty of Sedan was arrested in 1641, at the head of the French Army as a Peer of France, and imprisoned for treasonable practices with the Enemies of France, and was in danger of being brought to punishment for such breach of his Allegiance, and was only released by Louis the 14th on terms of pardon which led to the Cession of Sedan in Exchange for other possessions:—

We observe also, that the Laws of France are in respect to Allegiance not different from Our own Laws—

With the utmost liberty of Expatriation that is allowed, They retain the obligation of Allegiance, so far as to render it Criminal for a natural born Frenchman to be in Arms against France.

On these grounds, and referring to Our former Opinion, We think the Claim of Captain Folville, to be regarded by the Laws of France simply as a British Subject, under the Treaty, to the exclusion of his French Character cannot be maintained; and that it would not be expedient for His Majesty's Government to support such a pretension.

We have the Honour etc.,
Christ. Robinson
W. Garrow
S. Shepherd

The Right Honble Lord Viscount Castlereagh, etc. etc. etc.

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addition that 'the ancillary use for trading purposes does not deprive them of the character of public vessels'.

[1] F.O. 83. 2264: France, one of many Reports relating to Captain Folville, of which this is the only one relevant on the compatibility of being a sovereign with being a subject.

Doctors' Commons,
November 17th 1854.[1]

My Lord,

We are honoured with Your Lordship's Commands signified in Lord Wodehouse's Letter of the 18th October last stating that he was directed to acquaint us that Major General Charles Bentinck has at different times solicited Her Majesty's Government in his character of a British Subject to interfere in support of the claims which he and his family in the character of Representatives of a Sovereign German House, have to the Territory of Kniphausen which is now withheld from them by the Grand Duke of Oldenburg.

That we should find in the enclosed Memorandum, which had been partly compiled in the Foreign Office, and partly furnished by Major General Bentinck, and in the other correspondence therewith transmitted to us a full account of the case, of the position in which it now stands and of the extent to which the British Government have up to the present time interfered in the matter.

That Major General Bentinck is understood to be about to make a further attempt to effect an arrangement with the Grand Duke of Oldenburg by private negotiation. That the Diet at Frankfort having [*sic*] decided in favour of the pretensions of his family; but have held back up to the present time from giving effect to their decision, by compelling the Grand Duke of Oldenburg to act in accordance with it.

That under these circumstances Lord Wodehouse was pleased to request that we would consider and report to Your Lordship to what extent Her Majesty's Government would be justified in interfering in support of Major General Charles Bentinck, either with the Grand Duke of Oldenburg or with the Diet at Frankfort.

In obedience to Your Lordship's commands we have taken this case into consideration and have the honour to *Report*—

That the rights and claims of Major General Bentinck, to which Your Lordship's Letter refers, are wholly German, and are not only unconnected with his 'status' as a British Subject, but in some degree (being a claim to an independent Sovereignty[2]) inconsistent with that character.

It is the duty of the English Government to enforce the rights of its Subjects *as such*, but it has no concern with the interests which one of its Subjects may possess as a Member of a Foreign Confederation.[3]

There is moreover a proper Tribunal [viz: the German Diet] to which Major General Bentinck has addressed himself, and in our Opinion Her Majesty's Government would not be justified in interfering on his behalf further than in using its good Offices in procuring the due consideration of his claim in the proper quarter.

We have the honour to be &c.,
J. D. Harding
A. E. Cockburn
Richard Bethell

The Rt. Hon. The Earl of Clarendon.

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[1] F.O. 83. 2289: Hanover. This Opinion was repeated on 13 October 1856, with a slight concession towards Major-General Bentinck, namely, that the appropriate British Minister would present Major-General Bentinck's Petition to the Diet at Frankfort.

[2] See the Report made by the same Law Officers as to Rajah Brooke on 9 January 1854, above, p. 30.

[3] That it is possible as a matter of law for a British subject to be the head of a foreign state may be inferred from the decision of the House of Lords in *Duke of Brunswick* v. *King of Hanover* (1848), 2 H.L.C. 1; in respect of acts done by him in his sovereign capacity he is not amenable to British jurisdiction.

(*b*) *Occupation of territory by subjects*

The view has been expressed that the occupation by a private individual of territory which is *terra nullius* operates as the occupation of that territory by the state of which he is subject—at any rate (it is submitted) when that state does some act which ratifies or adopts the occupation.[1] Some of the Reports which will be printed under the title of Occupation bear upon this matter, and the following Report will suffice at this stage:

Doctors' Commons,[2]
January 15th 1859.

My Lord,

I am honored with Your Lordship's commands, signified in Mr. Hammonds letter of the 3rd January Instant, stating that he was directed to transmit to me two letters from the Board of Trade, inclosing copies of two letters from Messrs. D. and W. Henderson of Glasgow, requesting to be informed whether in the event of certain parties in this country British Subjects completing the purchase of some guano deposits on the 'Johnson Islands' together with the rights belonging thereto, which have been offered to them for sale under the circumstances set forth in Messrs. Henderson's letter of the 15th December last, Her Majesty's Government would protect the purchasers in their rights, and to request that I would take this matter into consideration and report to Your Lordship, at my earliest convenience, my Opinion thereupon.

Mr. Hammond was also pleased to state that a copy of the Act of the United States Congress quoted by Messrs. Henderson and Company would be found in the accompanying volume.

In obedience to Your Lordship's commands. I have taken this matter into consideration and have the honor to *Report*

1st. That Messrs. D. and W. Henderson appear to be acting merely as the Agents (and possibly the legal Agents) of other persons, whose names they do not disclose, and who have not as yet acquired any interest whatever in 'Johnson Islands' or the Guano to be procured therein.

2nd. They are asking a completely hypothetical question, as to the possible future conduct of Her Majesty's Government, in an indefinite state of circumstances, which has not yet arisen.

3rd. They do not appear to me, under these circumstances, to be fairly entitled to an answer.

4th. The real parties who contemplate engaging in the matter should at all events address Your Lordship in their own persons, authenticating their statements by their own signatures, and clearly explaining the facts and ultimate intentions of all concerned.

5th. Even if under some conceivable circumstances Her Majesty's Government should be inclined to protect, to any extent or as against any particular interference, British Subjects engaging in such a transaction as the present it would be in my opinion most unadvisable to give Messrs. Henderson any general assurance to this effect beforehand; it is obvious that the purport of any such intimation might be misunderstood or misrepresented, and made use of improperly for the purposes of private speculation and profit, and that it might lead to serious embarassment hereafter.

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[1] In a case where a naval officer, misreading his instructions, annexed some islands by mistake, Holker, Giffard and Deane reported (12 June 1877, Netherlands) that the inchoate title of the Crown was not perfected by a *de facto* occupation, and until 'ratified and confirmed' was 'liable to be impugned by any foreign nation'.

Upon the principle prevailing in the United States of America with regard to the effect of the discovery of the territory now belonging to them, see Marshall C.J. quoted in Moore, *Digest of International Law* (1906), § 16.

[2] F.O. 83. 2210: United States of America; see also Report of 26 January 1859, in the same volume, and two Reports of 26 August 1857, in F.O. 83. 2314: Pacific Islands.

6th. Messrs. Henderson and Co. do not state that the 'Johnson Islands' are wholly uninhabited, or that they are not, and have never been occupied or claimed by or on behalf of any Foreign Government or its subjects, or treated as being within any national dominion, jurisdiction, or protection.

7th. They do not state that the discoverers have actually taken possession of or occupied the Islands or the Guano thereon; or that they have obtained any assurance from the Government of the United States that the powers conferred upon the President and the Congress by the Act in question will be exercised in their favour. If they have not actually taken and kept possession, they can have acquired no title, and they are not consequently in a position to convey any Title to their British 'Assigns'. If they are in possession, *then* their possession is legally both by International law and by the Act, that of their Government, who may choose to accept and adopt their acts, and without whose formal and complete assent they cannot alienate to Foreigners the title to the Islands.

Subject to these observations I can only suggest that if an answer must be given to Messrs. Henderson, that answer should be in the negative.

The Act of Congress in substance affirms a principle which is in accordance with British and with International Law, viz. that the occupation by a private Citizen of an Island not occupied or belonging to any other person or Government, or within any Foreign jurisdiction, shall be deemed an occupation on behalf of the Federal Government; it proceeds to contemplate and provide for the assignment thereof to 'Citizens of the United States', and for the delivery of the guano therein for the use of Citizens of or residents in the United States exclusively: the spirit and policy of the act are obvious and 'the forfeiture of the protection of the United States' in the event of the assignment to British Subjects, contemplated and alluded to by Messrs. Henderson, would not divest the Government of the United States of its title to the Islands, rightfully acquired and accruing to it by international law on the ground of occupation by its citizens. The Government of the United States would not probably be disposed to allow the purpose and spirit of this act to be evaded with impunity, and Her Majesty's Government could not rightfully 'protect' the British Assignees 'with notice' in carrying out, as against the Government of the United States, any such scheme as that which appears to be in contemplation by Messrs. Henderson's friends or clients, and by certain Citizens of the United States.

I have the honor to be, etc.,

J. D. Harding

The Rt. Hon. The Earl of Malmesbury.

(*c*) *Acquisition of territory as a result of conquest by, or cession to, individuals and chartered corporations*

Foreign Office to the Law Officers of the Crown.

Gentlemen, *December* 13, 1897.

With reference to my letter of the 4th instant[1] on the question of the validity of

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[1] Unnecessary to print. It states that all the treaties negotiated by the Company were submitted to the approval of Her Majesty's Government, and gives the form of acceptance attached by the Company's negotiator to one of them: 'I, Captain Lugard, for and on behalf of the Company,

Treaties made with native African Rulers by the Agents of the Royal Niger Company, I have the honour, by the direction of the Marquess of Salisbury, to transmit to you the accompanying papers, which relate to a further question connected with these Treaties, which is intimately allied with that already before you, namely, whether, and, if so, in what manner, the interest of the Company in such Treaties can be conveyed to Her Majesty's Government in the event of the Company's Charter being revoked.

The facts which it is desired specially to bring to your notice in regard to this matter are, briefly, as follows:—

The National African Company (Limited) was incorporated in 1882 under 'The Companies Acts, 1862 to 1880'.

The Memorandum of Association declared the objects of the Company to be (among others) 'to acquire and hold any Charters, Acts of Parliament, privileges, monopolies, patents, or other rights or powers from the British Government or any potentate or local or other authority'.

The Company entered into Treaties with potentates and other local authorities.

In July 1886 a Royal Charter was granted to the Company, which thereupon, with the sanction of the Secretary of State, changed its name to the Royal Niger Company, Chartered and Limited.

Under powers given or confirmed by the Charter, the Company have since entered into Treaties with potentates and local authorities.

Of these Treaties, whether made before or after the grant of the Charter, some are made by and with the Company (Forms 5, 7, 8), and the remainder by and with the Company, its heirs, administrators, or assigns (Forms 1, 2, 3, 4, 6, 9, 10).

Her Majesty's Government are now engaged in negotiations with the Company, which may result in the revocation of the Charter, and I have the honour to request you to take into consideration the papers herewith transmitted to you, and also those which accompanied my above-mentioned letter of the 4th instant, and to ask you to favour Lord Salisbury with your opinion.

1. Will the said Treaties or any of them lapse on the revocation of the Charter?

2. If not, will the Treaty rights remain in the Company?

3.—(α.) Can the Company, before the revocation of the Charter, transfer those rights to their heirs, administrators, or assigns, so that such rights shall remain in them after the revocation? and

(β.) Can the Company constitute Her Majesty's Government their heirs, administrators, or assigns?

4. Would such transfer require the assent of the potentate or local authority with whom the Treaty was made?

5. In the possible alternative that the present Charter will not be revoked, but will be modified by a Supplementary Charter, taking over from the Company its rights of administration and leaving to it its rights as a commercial Company, would the answers to the foregoing questions be modified, and if so, in what respect?

The terms of the Memorandum of Association of the National African Company are recited in the Charter (inclosed in my letter of the 4th instant).

All Treaties made by the Company, whether before or after the grant of the Charter, are in one or other of the forms given in Hertslet's 'Africa by Treaty,' vol. i, pp. 450–479 herewith.

I have, &c.
FRANCIS BERTIE

do hereby approve and accept the above treaty, and do hereby affix my hand. (signed) F. D. Lugard (*Captain*)—Commanding Bargu Expedition.'

Report.

The Royal Niger Company is not a mere trading Company, but has also power to acquire, retain, and govern territory. It resembles the East India Company, the position of which was explained by Chief Justice Tindal in the case of Gibson *v.* East India Company, 5 Bingham, New Cases (Common Pleas Reports), p. 273.[1]

The late Mr. Hall, in his book upon international law (4th Edition, note on pp. 133, 134), takes the view that territory acquired by the Royal Niger Company is part of British dominions, and in the note on p. 110 of the same work he treats as obvious the proposition that the acts of such a Company as the East African Company are to be classed in point of competence with those of commissioned Agents of the State.

It appears to us that these views are correct. The Royal Niger Company must be regarded as a British subject, and it has acquired territory and a Charter from the British Crown.

Chief Justice Tindal, in the case already cited, at p. 272, said that the principle that all conquests made by subjects must belong to the Crown is a general principle pervading the law both of this and other States.

The same rule must, in our opinion, apply to the case of territory ceded or acquired by Treaty, and it appears to us to be quite clear that Treaties granted to the Niger Company are as effective for the purpose of establishing British rights as if they had been granted to a commissioned officer of the Crown.

Subject, of course, to the rights of the Company under the Charter, we have no doubt that, as a matter of British Constitutional Law, the Crown is entitled to assume to itself the benefit of these Treaties, just as all acquisitions made by the East India Company were regarded as being at the disposal of the nation.

We do not think that the Company has any general right to assign these Treaties. We attach no importance to the variation in the terms of the Treaties. In many cases they are expressed to be made with the Company alone, or with the Company and its administrators, which means the same thing. Even in cases where the Treaty was made with the Company and its assigns, we do not think that this conferred a general power of assignment upon the Company, as this would be inconsistent with the terms of the Charter, which conferred upon the Company personally the right to acquire and administer territory, and with the nature of the transaction embodied in the Treaty with the native Chief.

The title of the Crown to these Treaty rights depends not on any power of assignment given to the Company by the terms of the Treaty, but on the paramount rights of the Crown when a British subject has acquired territory abroad.

We do not think that any general answer can be given to the question whether any fresh consent by the African Chief or other authority should be regarded as necessary to confer on the Crown a valid title as against him. The answer might depend upon that which took place when the Treaty was signed.

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[1] (1839): at p. 272, Tindal C.J. referred to 'the general principle prevailing in the law, both of this and other states, namely, that all conquests made by subjects must necessarily belong to the Crown', and to the Statutes of 7 Geo. III, c. 57, and 53 Geo. III, c. 155, s. 61.

For the charter of the British North Borneo Company of 1 November 1881 and a note upon it, see Smith, *Great Britain and the Law of Nations*, vol. ii (1935), p. 77; on 14 July 1881 (Borneo), James, Herschell, and Deane reported that the granting of a charter by the Crown to this Company which held certain concessions of territory and grants of sovereign rights thereover from the Sultans of Brunei and Sulu 'will not have the effect of vesting in Her Majesty the sovereignty over the territory in question'; see also 17 September 1880 (Borneo) for advice as to a clause in the charter designed to protect the Crown against risks involved in responsibility to foreign Powers for the acts of the agents of the Company. On the acquisition of territory by chartered companies on behalf of their states, see M. Huber's Award in the *Island of Palmas Arbitration* in Scott, *Hague Court Reports*, second series (1932), pp. 115–17.

In view of the questions which we understand France has raised, or may raise, as to the validity and effect of these Treaties, and the circumstances under which they were made, it is in our opinion very undesirable to take any course which might give the French any apparent ground for disputing the continued validity of these Treaties.

If the Company were dissolved or reduced to the position of a mere trading Corporation, it might be contended by the French Government that the Treaty rights lapsed, that they had been conferred upon the Company personally, and that when the Company came to an end or ceased itself to administer these rights, the Chief was in the same position as if no Treaty had been entered into.

In any event, if any action is taken it should, in our opinion, be in the direction of control by Imperial Officers over the administration by the Company of its territory.

By arrangement with the Company the Government may acquire from it such rights in hand as are necessary for Government purposes.

The above Report appears to us to answer all the questions submitted to us, and we have only to add that we think it very undesirable that any change in the position of the Company, such as is suggested, should be made while the questions now pending with the French are unsettled.

Richard E. Webster
Robert B. Finlay

December 28, 1897.

9. *The Monroe Doctrine*[1]

This is a political doctrine, and we are not aware of any occasion on which it received the consideration of the Law Officers of the Crown other than the one about to be described.

In 1895, in connexion with a dispute between Great Britain and Venezuela in relation to the boundary between that country and British Guiana, the Government of the United States of America based its insistence on arbitration *inter alia* upon what is commonly called the Monroe Doctrine. The arbitration took place, the United States becoming responsible for the handling of the Venezuelan case.

President McKinley, in his annual message of 5 December 1899 to Congress, said that 'the decision [of the tribunal] appears to be equally satisfactory to both parties'.[2]

Foreign Office to the Law Officers of the Crown.

Gentlemen, *September* 20, 1895.

I have the honour to transmit to you, by direction of the Marquess of Salisbury, a despatch[3] from the Government of the United States, which has been left with his Lordship by Mr. Bayard.

Lord Salisbury does not desire to trouble you at present with the first part of the despatch. Until nearly the middle of page 7 in the printed copy which I inclose, it is exclusively concerned with a frontier dispute which has been going on for many years between the Republic of Venezuela and the Colony of British Guiana. This portion of the despatch, if it is necessary to answer it, can be answered separately. But after that point it proceeds to advance views with respect to questions of international law, upon which it is desirable that the opinion of the Law Officers of the Crown should be expressed.

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[1] For the literature upon the doctrine see Oppenheim, *International Law*, vol. i (6th ed., 1947), § 139, notes.

[2] Moore, *Digest of International Law* (1906), § 966, p. 583.

[3] Ibid., p. 535.

The argument of this part of the despatch may be summed up as follows:—

The United States have a right to protect every other independent State in North or South America from the control of any European State. Therefore, they have a right to protect every American State from any annexation of any part of its territory. The British Government claim a portion of territory adjacent to its frontier in Guiana, which Venezuela declares to belong to her. The United States cannot tell which of the two disputants is in the right. Therefore, by virtue of their prerogative of protecting Venezuelan territory from annexation, the United States insist that Great Britain shall submit the disputed issue to arbitration.

This argument rests largely on the doctrine laid down by President Monroe, which Lord Salisbury believes is now for the first time advanced in a formal communication addressed to another Power; and his demur to the control of American by European States and to European colonization in America receives a considerable development.

I am to call your attention to the treatment of this doctrine in the despatch, and to ask that his Lordship may be favoured with your opinion as to whether it is not desirable that it should be formally noticed, and that its incompatibility with international law, if such incompatibility exists, should be pointed out in reply.

Beyond this more theoretic issue there lies a further and more practical question. Whether the Monroe doctrine is true or false, it is undoubtedly within the competence of the United States to declare themselves the allies of Venezuela, and to go to war, if they please, for the boundary claimed by that Republic. But the summons by the United States to go to arbitration, in a cause which they are not themselves prepared to adopt as their own, or even to advocate, appears to Lord Salisbury to be novel, and likely to lead to anomalous results. Whenever any American State has a difference with any European State, the United States are to have a right of insisting on arbitration, without giving even such a pledge of the seriousness of the American claim as is involved in an undertaking to give it material support. I am to request you to advise whether this contention of the United States is justified by international precedent, and also to furnish his Lordship with some general observations upon this part of the case.

Lord Salisbury further desires me to call your attention to the following passages in the despatch:—

(Page 10.)—'That distance and 3,000 miles of intervening ocean make any permanent political union between an European and an American State unnatural and inexpedient will hardly be denied. But physical and geographical considerations are the least of the objections to such a union. Europe, as Washington observed, has a set of primary interests which are peculiar to herself. America is not interested in them, and ought not to be vexed or complicated with them. Each great European Power, for instance, to-day maintains enormous armies and fleets in self-defence, and for protection against any other European Power or Powers. What have the States of America to do with that condition of things, or why should they be impoverished by wars or preparations for wars with whose causes or results they can have no direct concern? If all Europe were to suddenly fly to arms over the fate of Turkey, would it not be preposterous that any

American State should find itself inextricably involved in the miseries and burdens of the contest? If it were it would prove to be a partnership in the cost and losses of the struggle, but not in any ensuing benefits.'

(Page 11.)—'Thus far in our history we have been spared the burdens and evils of immense standing armies, and all the other accessories of huge warlike establishments, and the exemption has largely contributed to our national greatness and wealth, as well as to the happiness of every citizen. But, with the Powers of Europe permanently encamped on American soil, the ideal conditions we have thus far enjoyed cannot be expected to continue. We too must be armed to the teeth, we too must convert the flower of our male population into soldiers and sailors, and, by withdrawing them from the various pursuits of peaceful industry, we too must practically annihilate a large share of the productive energy of the nation. How a greater calamity than this could overtake us it is difficult to see.'

These passages profess only to support the doctrine that European States are not to be allowed to annex any territory on American soil which they do not now possess. But they are drawn, apparently on purpose, so as to cover equally the case of territory now in the possession of European States. His Lordship would be glad of your opinion as to whether such arguments, if passed without notice, might not plausibly be quoted in some future controversy as accepted doctrines.

In order to assist you in the consideration of these questions, I have the honour to inclose a collection of papers bearing upon the Monroe doctrine.

I am, &c.
FRANCIS BERTIE

List of Papers.

(A.)	Mr. Olney to Mr. Bayard	.. .. ..	July 20, 1895.[1]
(B.)	Memorandum	.. ..	May 20, 1880.
(C.)	Ditto	.. ..	June 16, 1882.
(D.)	Ditto	.. ..	June 22, 1883.
(E.)	Sir J. Pauncefote	.. .. ..(No. 132)	May 3, 1895.
(F.)	Pamphlet.		

Report.

It is desirable that the treatment of the Monroe doctrine in the despatch in question should be formally noticed. In our opinion, the doctrine propounded in this despatch is absolutely incompatible with international law.

By international law, the United States have no right to interfere in any controversy between any other State in America and a European Power unless the action of either of the parties to the dispute seriously menaces the interests of the United States.

The so-called Monroe doctrine was, and can only be regarded as, a declaration of policy: it has not always been stated in the same terms, and can only be justified on the principle that the acquisition by European Powers of political control in America may be prejudicial to the United States, as tending to involve them in international complications.

In the despatch now in question, an attempt has been made to formulate the Monroe doctrine in such a way as to extend its operation far beyond those cases, which even in America have been considered as falling within it.

It is not pretended that the settlement of the dispute as to the boundaries between British Guiana and Venezuela can affect the interests of the United States. But the right is asserted to dictate a particular mode of settlement of that dispute because the territory in question is in South America.

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[1] For this despatch see Moore, op. cit., § 966, p. 535.

This appears to us to be an attempt to declare a policy, and possibly extract recognition of a principle in such a manner as to include a number of cases which in no way fall within the principle on which that policy professes to rest. In this view and having regard to the passages marked IIX, and the three concluding paragraphs of Mr. Olney's letter, it is extremely important that, in the reply, reference should be made to the declarations and actions of the United States since 1823, inconsistent with the view now attempted to be maintained. See Memorandum 4215 (Paper B), and 4823 (Paper D), also pp. 10 and 11 of J. B. Moore's pamphlet (Paper F).

As regards the second question, it appears to us that the claim of the United States to prescribe that the dispute should be settled by arbitration is wholly unjustified by international precedent.

International law recognizes the right of one State to interfere in the concerns of its neighbours, if such intervention is necessary for the purpose of self-preservation, or if it is demanded in the interests of humanity. The claim of the United States that Great Britain and Venezuela should settle the dispute by arbitration rests solely on the fact that Venezuela is in South America. It does not appear to us that the intervention of the United States on this occasion can be justified by the most elastic interpretation which has been given to the right of intervention.

With regard to the passages quoted from pp. 10 and 11 of the despatch in question, it does not appear to us, taking the despatch as a whole, that these passages were intended to lay down the proposition that the Monroe doctrine involves the withdrawal of any European Power from its present possessions in America. These passages, however, contain expressions which, taken by themselves, might appear to bear this construction, and we certainly think it desirable that any such use of them in the future should be precluded by noticing them in replying to the despatch.

RICHARD E. WEBSTER
R. B. FINLAY

October 12, 1895.

After receiving this opinion, Lord Salisbury replied to the American despatch of 20 July 1895 in two despatches to the British Ambassador at Washington, dated 26 November 1895.[1]

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[1] Moore, op., cit., § 966, pp. 559 and 565.

RESTRICTIVE INTERPRETATION AND THE PRINCIPLE OF EFFECTIVENESS IN THE INTERPRETATION OF TREATIES[1]

By PROFESSOR H. LAUTERPACHT, K.C., LL.D., F.B.A.
Whewell Professor of International Law in the University of Cambridge

I. *Rules of construction and the task of interpretation*

THE formulation of rules of interpretation of treaties has proved the object of strong temptation to writers, to arbitrators, and, occasionally, even to governments assembled at a conference.[2] Grotius devoted to it an entire chapter[3] which, when compared with some modern treatises, does not create the impression of being out of date. In various respects Grotius's treatment of the subject constitutes an advance upon some modern pronouncements by international tribunals and writers. Thus with regard to the doctrine of plain meaning he qualifies the statement that 'words are to be understood in their ordinary sense' by adding: 'if other implications are lacking'.[4] Vattel's chapter on 'The Interpretation of Treaties'[5] probably represents the most detailed discussion of the subject by any author of a general treatise. The chapter seems to concentrate on the frequently cited rule that 'it is not permissible to interpret what has no need of interpretation' and that 'when a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurdity, there is no ground for refusing to accept the meaning which the deed naturally presents'.[6] Yet it is most improbable that Vattel regarded this 'first general principle' as being of decisive practical importance. For it was followed by other general principles, by presumptions, and by elaborate distinctions between things favourable and things odious. It is doubtful whether any party to a dispute involving the interpretation of a treaty can fail to derive some advantage from the rich choice of weapons in Vattel's armoury of rules of interpretation. To a large extent Vattel followed the rules of the *Digest*. That fact, and not any conscious borrowing, was responsible for the circumstance that when three years later Pothier published his treatise on Obligations, his rules of interpretation—subsequently taken over almost textually by the *Code Civil* and the Italian Code[1]—showed a striking resemblance to those formulated by Vattel.

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[1] The present article is based to some extent upon two sections of a Report on Interpretation of Treaties submitted in 1950 by the writer to the Institute of International Law.

[2] See the Resolution of the Seventh International Conference of American States in 1933 submitting to study by the International Commission of American Jurists a list of rules of interpretation (printed in *Harvard Research, Law of Treaties* (1935), pp. 1225, 1226).

[3] 'On Interpretation': Book II, ch. xvi of *De jure belli ac pacis*.

[4] Ibid., II.

[5] Vol. i, ch. xvii of *Le droit des gens*.

[6] Para. 263.

The majority of text-book writers have followed in this respect in the footsteps of Grotius and Vattel.[2] They have not all been writers given to mere speculation and generalization. Thus Hall, while admitting that there are rules of interpretation which are unsafe in their application and of doubtful applicability, believed that there can be found some to which no objection can be raised and which 'are probably sufficient for all purposes'. He proceeded to elaborate them in detail.[3] Others, while expressing scepticism as to the usefulness of rules of interpretation in general, nevertheless give a detailed catalogue of them. Thus Oppenheim—in a section which the present editor has left without substantial changes more out of piety than conviction—states expressly that there exist neither customary nor conventional rules of interpretation concerning the interpretation of treaties. He then adds that 'it is of importance to enumerate some rules of interpretation which commend themselves on account of their suitability'.[4] He enumerates fifteen of these rules. More recently, notwithstanding the growing criticism of the method of laying down fixed rules of interpretation, most writers find it difficult to dispense with them. Professor Guggenheim speaks of 'the supremacy, recognised in international practice, of restrictive as distinguished from extensive interpretation'.[5] He admits that that interpretation applies only in case of doubt, but is of the opinion that the rule is of great importance (it will be noted—although this is often forgotten—that, necessarily, all rules of interpretation apply only in case of doubt; where there is no doubt, there is no necessity for interpretation). Professor Podestá Costa, while admitting the justification of recent opinion critical of the formulation of rules of interpretation, nevertheless adopts as fundamental two principles of construction which are, in fact, most controversial, namely, that clear terms do not require interpretation and that in case of doubt restrictive interpretation must be the rule.[6] These two principles are also adopted—among others—by Professor Rousseau in his exhaustive treatment of the subject.[7] Only very few text-book writers attach importance to consistency by declining resolutely to formulate rules of construction, by way of illustration or otherwise, other than that of the fundamental requirement of *uberrima fides*. Professor Hyde—a no mean authority on the subject—has made a powerful contribution to the elucidation of this branch of international law without suggesting any specific rules of interpretation.[1] He has expressly discouraged recourse to them. More recently, Professor Balladore Pallieri has been equally consistent in exercising the same kind of restraint.[2] However, while the great majority of writers who, in monographs, have devoted special attention to the subject,[3] show little respect for rules of interpretation, others have stressed their general usefulness.[4]

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[1] For an illuminating analysis see Fairman in *Transactions of the Grotius Society*, 20 (1934), pp. 129, 130.

[2] For an enumeration of some of them see *Harvard Research, Law of Treaties* (1935), pp. 939–40. See also ss. 797–821 of Fiore's *International Law Codified* (Borchard's translation from the Italian, 1918).

[3] *A Treatise on International Law* (3rd ed. 1890), para. 111.

[4] *International Law*, vol. i (7th ed. 1948), §§ 553, 554.

[5] *Lehrbuch des Völkerrechts* (First Part, 1947), p. 128.

[6] *Manual de derecho internacional público* (2nd ed. 1947), pp. 197, 198.

[7] *Principes généraux du droit international public*, vol. i (1944), pp. 678, 686–94.

Whatever may be the results which the science of international law is reaching gradually but emphatically in the matter of rules of interpretation, the latter have constituted a prominent feature of the activity of international tribunals—although it is only by way of exception that, as in the *Georges Pinson* case, the arbitrators have gone to the length of enunciating a system of rules of interpretation.[5] The International Court of Justice and its predecessor have constantly applied rules of interpretation.[6] The Court has given its sanction, however nominal, hesitating, and inconclusive, to the principle of restrictive interpretation. It has approved, more frequently and decisively, the opposite rule of effectiveness. In a variety of ways it has given its adherence to the doctrine of 'plain terms' or 'clear meaning'. It has made a distinct, though controversial, contribution to the question of the use of preparatory work. It has applied rules of interpretation by reference to the immediate and general context. It has relied on such technical rules of interpretation as *expressio unius est exclusio alterius* or that doubtful clauses must be construed *contra proferentem*.[1] It has qualified some of these rules by the overriding principle that they can be legitimately resorted to only when the treaty is not clear or when all other means of interpretation have failed. Yet notwithstanding the accompanying qualifications, some of the rules enunciated by the Court, especially those in the matter of restrictive interpretation and of preparatory work, seem to have acquired what would have been a substantial degree of rigidity but for the fact that the Court is not bound by its previous pronouncements and that often it has not acted upon them in the very cases in which it gave utterance to them. As such they must continue to be a source of uncertainty. This is so although—or perhaps because—they have been put forward subject to qualifications. For these qualifications are themselves not free from doubt. To say that the rule as to restrictive interpretation or preparatory work may be relied upon only when the treaty is not clear is to lay down a condition the actual application of which is the result of the process of interpretation, and not its starting-point. To say that the principle of restrictive interpretation may be invoked only when other means of interpretation have failed is to suggest that it serves a distinctly limited purpose—for it is seldom, if ever, that some result, however deceptive, cannot be achieved by resort to one or more of the multifarious rules of interpretation.

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[1] *International Law. Chiefly as Interpreted and Applied by the United States*, vol. ii (2nd ed. 1945), pp. 1468–1502.

[2] *Diritto internazionale pubblico* (4th ed. 1948), pp. 235–40.

[3] See, in particular, Yü, *The Interpretation of Treaties* (1927); Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933); Harvard Research, *Law of Treaties* (1935), pp. 937–77.

[4] Professor Ehrlich, in a valuable course of lectures, undertook a spirited defence of rules of interpretation (*Recueil des Cours de l'Académie de droit international*, 24 (1928), pp. 13–79). The author of a doctoral dissertation—Prieur, *Die Auslegung völkerrechtlicher Verträge* (1930)—has suggested twenty-two rules of interpretation of treaties and has urged that only a steady increase in the number of these rules will make possible a further development of that branch of international law. Sir Eric Beckett in his observations, submitted in 1950, on the present writer's Provisional Report on Interpretation of Treaties, said: 'It must be presumed (although, in fact, it is by no means always the case) that treaties have been drafted by experts who have full knowledge of the rules of interpretation which international tribunals apply. International tribunals above all have good reasons to endeavour to base their conclusions on the application of legal principles and precedents and to avoid the suspicion of favouritism and arbitrariness.'

[5] France and Mexico, Mixed Claims Commission (Verzijl, President). The rules are reproduced verbatim in *Annual Digest of Public International Law Cases*, 1927–8, Case No. 292. But see below, p. 51, for the view of Professor Verzijl, who as arbitrator formulated these rules, on the value of rules of interpretation.

[6] This aspect of the work of the Court is surveyed lucidly and exhaustively by Professor Hudson in *Permanent Court of International Justice, 1920–1942* (1943), pp. 631–61. It may be difficult to assent to the view of the learned writer that the Court 'has formulated no rigid rules'. The Court is free to decline to apply them, not, perhaps, because they are in a form which is guarded and qualified, but because it is not bound to follow its own decisions. Thus there is a measure of rigidity in the frequent statement that there is no room for recourse to preparatory work when the treaty is clear. Though it is a rigidity mitigated by the fact that in actual practice the Court has often had recourse to that method of interpretation either on account of the fact that the treaty was not clear or by way of 'confirming' a result reached independently of 'preparatory work', the Court has occasionally acted in that way. Thus in the Advisory Opinion of May 1948 on *Conditions for Admission of a State to Membership in the United Nations* the Court considered that 'the text is sufficiently clear' and that 'consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself' (at p. 63). In the Advisory Opinion of March 1950 on the *Competence of the General Assembly for the Admission of a State to the United Nations* the Court in relying on the 'natural and ordinary meaning' of the words of the Treaty held that 'it is not permissible, in this case, to resort to *travaux préparatoires*' (at p. 8). Yet although the Court found 'no difficulty in ascertaining the

However, notwithstanding the frequency of the resort by international tribunals to rules of interpretation, the general trend in the literature of international law seems to deprecate them and to stress their essential unhelpfulness. This is not a case of writers being wiser than the practice of courts. It is merely a case of writers being more easily in a position to assess the cumulative result of experience. Thus Professor Verzijl, who in 1928 in his capacity as President of the French-Mexican Mixed Claims Commission formulated a detailed list of rules of interpretation, said ten years later, in referring to the rules of interpretation adopted by the Permanent Court

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natural and ordinary meaning of the words in question and no difficulty in giving effect to them' (ibid.), it proceeded to consider 'the structure of the Charter, and particularly the relations established by it between the General Assembly and the Security Council'—a fact suggesting that the 'natural and ordinary meaning' of the words in question was not fully obvious. However, the examination of the question of preparatory work falls outside the purview of the present article.

[1] See below, p. 63.

of International Justice: 'In principle they are all correct, but on concrete application they often abrogate each other and frequently appear worthless. . . .'[1] The view which is gaining increasing acceptance seems to be that some of the current rules of construction of treaties are in themselves of controversial validity; that many of them are mutually exclusive and contradictory—such as the rule of restrictive interpretation when related to the rule that treaties must be interpreted so as to be effective rather than ineffective; and that instead of aiding what has been regarded as the principal aim of interpretation, namely, the discovery of the intention of the parties, they end by impeding that purpose. It may be added that in so far as 'revealing the intention of the parties' has in itself assumed the complexion of a somewhat stereotyped formula, it may, on occasions, conceal the true difficulties of interpretation. For the question frequently arises whether the intention of the parties can be the decisive factor in cases where, as often happens in international instruments, the treaty—far from giving expression to any common intention of the parties—actually registers the absence of any common intention (either in general or in relation to the subject-matter of the dispute) or contains provisions which are mutually inconsistent and which the creative work of interpretation must reduce to some coherent meaning.[2] That absence of relevant common intention is not confined to treaties. In relation to the interpretation of contracts situations frequently arise in which the decision must be given by reference to the implied intention of the parties for the reason that the actual subject-matter of the dispute was not present to the minds of the parties at the time of the conclusion of the agreement or for other reasons. In the international sphere the occasions for such necessity of acting on implied intention are more frequent.[3]

It is not the object of the present article to examine in detail the various rules of interpretation or to survey the entire field of construction of treaties. On the other hand, the experience of arbitral and judicial settlement seems to justify—and to call for—a re-examination of the main principles governing the subject. Such re-examination may help to clarify the legal position, to discourage appeal to time-honoured but essentially unhelpful formulas, and, as a result, to contribute to the economy of the judicial process and to the scientific character of the process of interpretation. Parties to controversies, before international tribunals and elsewhere, will probably continue to rely on arguments drawn from rules of interpretation of long standing. But there may be merit in an effort calculated to discourage resort to facile formulas.

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[1] Before the Royal Netherlands Academy of Science—as quoted by Fockema Andreae, *An Important Chapter from the History of Legal Interpretation* (1948), p. 75.

[2] See below, p. 81.

[3] See below, p. 82.

In a sense the controversy as to the justification of rules of interpretation partakes of some degree of artificiality inasmuch as it tends to exaggerate their importance. For as a rule they are not the determining cause of judicial decision, but the form in which the judge cloaks a result arrived at by other means. It is elegant—and it inspires confidence—to give the garb of an established rule of interpretation to a conclusion reached as to the meaning of a statute, of a contract, or of a treaty. But it is a fallacy to assume that the existence of these rules is a secure safeguard against arbitrariness or partiality. The very choice of any single rule or of a combination or cumulation of them is the result of a judgment arrived at, independently of any rules of construction, by reference to considerations of good faith, of justice, and of public policy within the orbit of the express or implied intention of the parties or of the legislature. What fixed canons of law are there which can uniformly impose upon the judge the choice of one of the three classical rules of interpretation: the doctrine of 'literal' or 'plain meaning' according to which if the words are plain and unambiguous they must be construed in their ordinary sense, even if such an interpretation leads to an absurdity or a manifest injustice; the 'golden rule' according to which 'the grammatical and ordinary sense of words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no farther';[1] or the 'mischief rule' which, although formulated as far back as 1584,[2] must for ever continue to be the inspiration, avowed or actual, of all work of interpretation? What rigid rules of law or construction can prevent the judge from assuming an ambiguity or absurdity, as he sees it, in order to make the interpretation conform with his understanding of the purpose of the treaty or the object of the statute?[3] Conversely, there is nothing easier than to purport to give the appearance of legal respectability and plausibility—by the simple operation of selecting one or more rules of interpretation—to a judicial decision which is lacking in soundness, in impartiality, or in intellectual vigour.

There are three other factors which severely limit the part of rules of interpretation as an absolute check upon the free use of judicial discretion. In the first instance, the selection of any particular rule, out of a number of competing and occasionally mutually inconsistent rules, is necessarily a matter of discretion. The discretion is proportionate to the number and the elasticity of the rules available. Secondly, there is no assurance that a judge, bent upon achieving a desired result, will not purport to base his decision upon a rule which nominally covers the issue but in fact has little to do with it. Thirdly, it is not necessary for the judge formally to use any rules of interpretation at all—even as a mere device for achieving a desired result which he considers to be consistent with the common intention of the parties or, in its absence, with justice and good faith. This is shown, for example, by the way in which, in the *Corfu Channel* case, the International Court of Justice interpreted the Special Agreement conferring upon it jurisdiction to determine whether 'there is any duty to pay compensation' with respect to the liability of Albania for the explosion in the Channel and the resulting damage and loss of life. It referred specifically to the 'generally accepted principles of interpretation' and held that it would be incompatible with these rules 'to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect'.[1] But this was not the only reason underlying the decision. The Court inquired in detail into the history of the Special Agreement, beginning with the Resolution of the Security Council of April 1947 which recommended that the two Governments should refer the dispute to the Court. The Court could have appended to that aspect of its interpretation one of the appellations current with regard to historical interpretation. It then construed the Special Agreement by reference to the 'subsequent attitude of the Parties'.[2] It could have invoked here the rule of *contemporanea expositio* on which it relied on previous occasions. Instead, after recalling the subsequent conduct of the parties as an element of interpretation of the intention of the parties, it preferred to construe that subsequent conduct as 'an implied acceptance of the Court's jurisdiction'. It then proceeded, without invoking any particular designation, to apply the rules of what is often described as logical interpretation or interpretation by reference to the context. It referred to the second part of the Special Agreement in which the Court, with respect to any liability of the United Kingdom in the matter of the alleged violation of Albanian sovereignty, was asked to decide whether there is 'any duty to give satisfaction'. The Court pointed out that that particular part of the Special Agreement had been signed by both parties on the basis that this question should be decided by the Court. The Court said:

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[1] *Gray* v. *Pearson*, 10 E.R. at p. 1234.

[2] In *Heydon's* case, 3 Co. 7 b.

[3] 'A word is not a crystal, transparent and unchangeable, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time it is used' (Mr. Justice Holmes in *Towne* v. *Eisner* (1918), 245 U.S. at p. 425). In *Ellerman Line* v. *Murray*, [1931] A.C. 126, all the judges were agreed that the meaning was 'plain', but there were at least three different views as to what that 'plain meaning' was. For a survey of the origin and limitations of the doctrine of 'plain meaning' in the interpretation of statutes see Willis in *Canadian Bar Review*, 16 (1938), pp. 11 ff., and Corry in *University of Toronto Law Journal*, 1 (1936), pp. 286–312.

> 'If, however, the Court is competent to decide what kind of *satisfaction* is due to Albania under the second part of the Special Agreement, it is difficult to see why it should lack competence to decide the amount of compensation which is due to the United Kingdom under the first part. The clauses used in the Special Agreement are parallel. It cannot be supposed that the Parties, while drafting these clauses in the

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[1] The *Corfu Channel* case, 1949, *Merits*, p. 24.

[2] Ibid., p. 25.

same form, intended to give them opposite meanings—the one as giving the Court jurisdiction, the other as denying such jurisdiction.'[1]

Finally, the Court interpreted the Special Agreement in the light of the various declarations of the parties which preceded it and in which they manifested their intention to accept the recommendation of the Security Council to the effect that the dispute in its entirety—i.e. including the question of the amount of compensation—should be settled by the Court. That method of applying principles of interpretation without appending to them any technical description is a constant feature of the activity of the Court.

It thus appears that the importance of rules of interpretation is limited in the sense that, when used by the Court, they are not necessarily the decisive factor in reaching the decision and that a decision reached by reference to what is generally described as a rule of interpretation is often arrived at without any specific mention of the rule in question. That fact does not mean that we are at liberty to ignore the problems, outlined above, resulting from the actual or potential recourse to them. It means that the examination must be directed not so much to a criticism of rules of interpretation in general, or of their number, as to the accuracy of particular rules, the manner of their application, and their hierarchical importance when viewed in their totality. Thus the relevant questions are: Is the doctrine of plain meaning an accurate or workable rule? What is the value, as a matter of principle and practice, of the rule of restrictive interpretation? What is the justification for the limitation of the part of preparatory work? What are the limits of the doctrine of effectiveness? What are the problems arising out of the application of the fundamental principle of interpretation by reference to the intention of the parties? It is not the purpose of this article to answer all these questions. In particular, no attempt will be made to discuss here the problem of recourse to preparatory work which, although apparently of a technical nature, constitutes, when related to the doctrine of 'plain meaning', one of the main problems of interpretation of treaties. In the present article it is proposed to examine, in the first instance, to what extent the doctrine of restrictive interpretation has actually found a place in the practice of international tribunals, and in particular of the International Court of Justice. Secondly, it is intended to inquire into the degree of the adoption of the rival principle of effectiveness and its implications in relation to the rule of restrictive interpretation. Finally, it is proposed to consider, in relation to the principles both of restrictive interpretation and of effectiveness, the problems and limitations of what must remain the main task of interpretation, namely, the discovery of the intention of the parties.

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[1] At p. 26.

II. *The principle of restrictive interpretation of obligations as a general principle of law*

Most of the current rules of interpretation, whether in relation to contracts or treaties, are unobjectionable. They are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith. This, in fact, is the only provision of the German Civil Code on the subject. It lays down, in a single article,[1] that contracts must be interpreted in good faith having regard to general usage. That overriding rule must indeed be regarded as one of the general principles of law recognized by civilized states in the matter of interpretation. Yet it is surprising to find that the application of that principle produces divergent results with regard to one of the main aspects of the question, namely, whether in case of doubt the contract must be interpreted in favour of or against the party bound by the obligation. The French Civil Code accepts the first of these solutions: 'Dans le doute, la convention s'interprète contre celui qui a stipulé et en faveur de celui qui a contracté l'obligation.'[2] Up to 1942 the Italian Civil Code followed, in identical terms, the same rule.[3] On the other hand, the rule of interpreting the contract in favour of the party bound by the obligation is not a principle adopted by the common law countries, in particular in England and the United States. It is an established rule in English law that a deed or other instrument must be interpreted 'most strongly' against the grantor or contractor.[4] In a different sphere the principle—which is not confined to English law—that the grantor must not derogate from his grant belongs to the same category.[5]

It is of interest to note that in these two groups of countries the varying principles adopted are explained in the same way, i.e. by reference to the same logical and equitable consideration as expressed in the maxim—of which there are a number of variants—*verba ambigua accipiuntur contra proferentem*. The terse formulation of the French Code clearly expresses that connexion. The contract is interpreted against the party which *has stipulated* and in favour of the one which has contracted the obligation.

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[1] Art. 157.

[2] Art. 1162.

[3] Art. 1137. The new Italian Code of that year introduced a significant change. It laid down that restrictive interpretation in favour of the debtor is to be applied only when all other rules of interpretation have failed—'quod nullo modo potest intellegi', as Ruggiero and Maroi put it in *Istituzioni di diritto privato* (6th ed. 1947), p. 203—and only if there was no consideration for the benefit of the obligee. Otherwise the contract is to be interpreted by reference to an equitable apportionment of the interests of the parties ('nel senso que realizzi l'equo contemperamento degli interessi delle parti').

[4] *Chitty on Contracts* (20th ed. 1947), p. 170. But this is so only in case of ambiguity and only when other means of construction have failed. See Lord Sumner in *London & Lancashire Fire Insurance Co.* v. *Bolands*, [1924] A.C. 836, at p. 848.

[5] See, for example, *Harmer* v. *Jumbil (Nigeria) Tin Areas Ltd.*, [1921] 2 Ch. 201; *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q.B. 836; *Browne* v. *Flower*, [1911] 1 Ch. 219. See also the decision of the French Court of Cassation, Chambre des Requêtes, 25 April 1893 (*Dalloz Périodique*, 93. I. 287), and that of the German Reichsgericht of 19 January 1906 (372/05).

Obscuritas pacti nocet ei qui apertius loqui potuit. The party which stipulates —i.e. which formulates the contract—is the party which is the creditor, the obligee. This was the position in Roman law. Savigny gives an explanation of the historic origin of the rule: The essence of the contractual relation consists in the mutually conforming declaration of will as to the contents of the obligation. Accordingly, the party which undertakes the drafting of the contract undertakes the responsibility for such conformity. It follows that in case of an ambiguity the drafting party is responsible for any mistake of the other party. For the party responsible for the drafting either deliberately introduced the ambiguity in order to mislead the other party or he was negligent. In either case the interpretation must be against him. This reasoning was adduced in particular with regard to the *stipulatio* where the questioner was responsible for the form of the question which determined the reply of the opposing party.[1] Williston, the leading American authority on the subject, gives a similar explanation:

> 'Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning, than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favour of the latter; and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be interpreted in favour of the promisee. This rule finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company and the words therefore are construed most strongly against it.'[2]

Thus as the result of an interesting legal development the same principle of interpretation *contra proferentem* which in English and American law has led to the acceptance of the rule that the contract is to be construed against the giver of the promise was responsible in the Roman law system for the appropriate principle of restrictive interpretation in favour of the debtor. Accordingly, while the interpretation *contra proferentem* may fairly be regarded as a general principle of law—though, as will be shown,[3] the field of its application in the sphere of international law is limited—the rule of restrictive interpretation in favour of the debtor can hardly claim the character of a principle of law of unchallenged generality.

However, the main reason why the rule of restrictive interpretation has acquired prominence in international law is not that it has been considered by many to represent a general principle of law. The main explanation of the prominence of the rule of restrictive interpretation in the international sphere is that it has been resorted to by reference to and on account of the sovereignty of independent states. It is not only that in case of doubt the contractual obligation must be interpreted in favour of the debtor; it is because states are sovereign that a restrictive interpretation must be put upon their obligations. In the first contentious case which came before the Permanent Court of International Justice,[1] Judges Anzilotti and Huber in a Dissenting Opinion urged a restrictive interpretation of the obligation undertaken by Germany because, in their words: 'The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation.' In the proceedings arising out of the first important Advisory Opinion rendered by the Permanent Court of International Justice—the Opinion relating to the *Competence of the International Labour Organization in the matter of the regulation of conditions of work of persons employed in agriculture*—it was urged on behalf of the Governments which denied that the Organization had competence that as the very establishment of the International Labour Organization implied a relinquishment of rights of national sovereignty, it was not permissible to extend the jurisdiction of the Organization by way of interpretation. Counsel appearing on behalf of the French Government admitted that the restriction of sovereignty involved in membership of the Organization was inconsiderable, but he was insistent that as some restriction was placed on the sovereignty of the states concerned, the text must be construed strictly and in a narrow sense.[2] In fact, a substantial part of the pleadings before international tribunals has been conducted in terms of the argument of restrictive interpretation. 'International Law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will. . . . Restrictions upon the sovereignty of States cannot therefore be presumed.'

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[1] Savigny, *Das Obligationenrecht*, vol. ii (1853), p. 193. See also L. 99 pr. de V.O. (45.1): 'ac fere secundum promissorem interpretamur, quia stipulatori liberum fuit verba late concipere'; *Dig.* xlv. i. 38. 18: 'In stipulationibus quam quaeritur, quid actum sit, verba contra stipulatorem interpretanda sunt'; ibid. ii. 14. 39: 'Veteribus placet pactionem obscuram vel ambiguam venditori et qui locavit nocere, in quorum fuit potestate legem apertius conscribere'; and see ibid. xviii. 1, 21; L. 17. 172; xviii. 1. 33. Attention to this aspect of the matter is drawn in a suggestive footnote in Phillimore's *Commentaries upon International Law*, vol. ii (3rd ed., 1882), p. 109, n. x.

[2] *A Treatise on the Law of Contract* (revised ed. 1936), vol. iii, § 621. The same view is expressed in the American Law Institute's *Restatement of the Law, Contracts*, vol. i (1932), p. 328 (§ 236), where the rule is laid down that terms must be interpreted against the party from whom they proceed, *unless their use by him is prescribed by law.*

[3] See below, p. 64.

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[1] *The Wimbledon*, Series A, No. 1, at p. 37.

[2] He said: 'It is a fundamental principle that States, justly jealous of their sovereign prerogatives, do not abandon them willingly and that all limitations of their sovereignty must be formally embodied in the text. One of the great principles of civil law is that in case of doubt, liberty cannot be presumed to have been restricted; *a fortiori*, when important legal personalities such as States are concerned, it is a principle that, in case of doubt, their special attributes, which include not merely liberty, but sovereignty, cannot be considered as having been in any way restricted' (Professor de Lapradelle: *P.C.I.J.*, Series C, No. 1, p. 174). It will be noted that learned Counsel limited himself, rightly, to civil law—by which are probably meant the systems of Roman law. See also Series C, No. 12, p. 63, for a somewhat similar argument by Professor Borel (who, it will be noted, expressed similar views in the arbitration between the United States and Sweden: see below, p. 63). And see to the same effect the argument on behalf of Bulgaria summarized in the award of 23 March 1933, in the arbitration between Bulgaria and Greece concerning the *Interpretation of the Treaty of Neuilly: Reports of International Arbitral Awards*, vol. iii (United Nations, 1949), p. 1400.

That principle, which in *The Lotus* case[1] the Permanent Court of International Justice enunciated—perhaps without compelling necessity—with regard to customary international law, lends itself even more easily to application in the field of treaties. It has been so used.

It has been shown that the principle *in dubio mitius*, in so far as it implies an interpretation unfavourable to the recipient of benefits under the contract and one which is less onerous to the party burdened with an obligation, is not a general principle of law. Moreover, quite independently of that fact its merits do not seem to be as apparent as is generally assumed. It is a principle which is open to the objection that it does not take into account the benefits which the party bound by the commitment has reaped in consideration of its undertaking. It considers the contractual obligation as implying, prima facie, an impairment of freedom. The very reverse may often be the case. Contract, in the relations of parties of unequal economic power, may be a legalization of subjection and servitude. But that is not its typical characteristic. Neither is it easy to assert without qualifications the proposition, occasionally put forward, that the principle of *favor debitoris* represents a precept of good faith inasmuch as it must be presumed in case of doubt that the obligor intended to be bound to the least possible extent. For can it not be contended that the obligee, who has given valuable consideration, is entitled in case of doubt to interpretation in his favour? There are only two factors which may, in moderation, legitimately be taken into account in support of the principle *in dubio mitius*. The first is that the burden of proof must rest, as a rule, on the party alleging the restriction on the obligation.[2] It is reasonable to assert that, in the absence of proof to the contrary, a party cannot be presumed to have undertaken an obligation or agreed to a restriction. The second is grounded in the principle of good faith and convenience expressed in the rule, discussed below,[3] as to the interpretation *contra proferentem*. Unlike the principle of restrictive interpretation of obligations, that rule must be regarded as a general principle of law. However, even in those systems of law in which the principle of restrictive interpretation in favour of the debtor is recognized, its practical significance is reduced to the minimum by the fact that it applies only when all other means of interpretation have failed—a rare and improbable contingency.[1] That limitation of its application goes back to Ulpian, who accepted only as the *ultima ratio* the principle *ad id, quod minimum est, redigenda summa est*.[2]

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[1] Series A, No. 10, p. 18.

[2] See, for example, the award of the Special Arbitrators of 13 April 1935, in the case of *Radio Corporation of America* v. *National Government of China* (*Annual Digest*, 1935–7, Case No. 12): 'The Chinese Government can certainly sign away a part of its liberty of action, and this also in the field of establishment of international radio-communications, and of co-operation therein. . . . But as a sovereign government, on principle free in its action for the public interest as it sees it, it cannot be presumed to have accepted such restriction of its freedom of action, unless the acceptance of such restriction can be ascertained distinctly and beyond reasonable doubt. . . . It is a correct rule, known and recognised in common law as well as in international law, that any restriction of a contracting Government's rights must be effected in a clear and distinct manner' (*Reports of International Arbitral Awards*, United Nations, vol. iii (1949), p. 1627). See also the Advisory Opinion of the Permanent Court of International Justice in the case of *Access to, or Anchorage in, the Port of Danzig, of Polish War Ships* (*P.C.I.J.*, Series A/B, No. 43, p. 142), where the Court held that exceptional derogations from the rights of the Free City must be established on a clear basis.

[3] See p. 63.

In the international sphere there seems to be no justification for it unless we make the notions of sovereignty and of presumptive freedom of action the decisive considerations and the starting-point of the task of interpretation. There is no warrant for doing that. The purpose of treaties—and of international law in general—is to limit the sovereignty of states in the particular sphere with which they are concerned. Their purpose is to lay down rules regulating conduct by restricting, in that particular sphere, the freedom of action of states. To a large extent treaties have no meaning except when conceived as fulfilling that function. For the same reason there is less substance than is generally assumed[3] in the suggestion that, in particular with regard to treaties, there is a presumption against derogations from a general principle and that restrictive interpretation must be the rule in such cases. For the very object of a treaty may be to derogate from an accepted general principle. There is no compelling reason to assume that treaties are merely of a declaratory nature or confined to regulating matters of detail. If the parties, in a freely accepted treaty, go to the length of inserting a provision of an exceptional nature, it must be presumed that they intended that provision to be fully effective and its operation unhampered by restrictive rules.

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[1] See Grassetti, *L'interpretazione del negozio giuridico con particolare riguardo ai contratti* (1938), p. 219.

[2] Fr. 34, *in fine*, Dig. de div. reg. Jur. 50. And see the French and Italian Codes, referred to above, p. 56.

[3] Thus in *The Wanderer* the British-American Claims Arbitral Tribunal held in 1921 that as the United States in seizing a British vessel in alleged enforcement of the Behring Sea Regulations acted under a special agreement and that as 'any such agreement, being an exception to the general principle, must be construed *stricto jure*', the mere possession of firearms and munitions was not a contravention of the Regulations, which prohibited only *the use* of such firearms and munitions (*Annual Digest*, 1919–22, Case No. 120). The question of interpretation of exceptional treaty provisions was highly relevant in the case of *The I'm Alone*, decided in 1933–5, between Canada and the United States (see ibid., 1933–5, Case No. 86). However, as no reason accompanied the award it is not certain to what extent the Commissioners accepted the Canadian contention as to the necessity for a restrictive interpretation of such provisions. See, for a discussion of this aspect of the question, Fitzmaurice in this *Year Book*, 17 (1936), pp. 97–100. See also the Separate Opinion of Judge Anzilotti in the *Lighthouses* case (*P.C.I.J.*, Series A/B, No. 62, p. 39), and the Dissenting Opinion of Judge Loder in *The Lotus* (ibid., Series A, No. 10, p. 95). And see the following passage in the award of Borel, Arbitrator, in the case of *The Kronprins Gustaf Adolf*, decided in 1932, between the United States and Sweden: 'The general rule that limitations imposed by a treaty on the natural liberty of a State are to be strictly interpreted applies with special emphasis to provisions of so exceptional a nature as those of Separate Article 5. This article stipulates that, once on board, merchandise, the export of which is forbidden, can no longer be stopped. . . . It does not go further and does not allow any inference beyond its strict terms' (*Reports of International Arbitral Awards* (United Nations, 1949), vol. ii, p. 1287).

In the light of these considerations we may now examine the application of the doctrine of restrictive interpretation by international tribunals and, in particular, by the International Court of Justice and its predecessor.

III. *The rule of restrictive interpretation and the practice of international tribunals*

There were indications in the very first judgment which the Permanent Court of International Justice was called upon to give—in *The Wimbledon* case[1]—that it might make a decisive contribution towards putting this aspect of interpretation on an adequate basis when, in a frequently quoted passage, it said:

> 'The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'[2]

Yet in the same Judgment the Court laid the foundations for a series of pronouncements,[3] almost identical in wording, in which it committed itself to the doctrine—however nominal—of restrictive interpretation of provisions implying a limitation of state sovereignty. The latter circumstance, the Court said, 'constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation'.[4] It then proceeded to qualify the principle of restrictive interpretation: 'But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.'[4]

The combination of the recognition of the principle of restrictive interpretation with the refusal to apply it in individual cases on the ground that the treaty is clear or that restrictive interpretation can be resorted to only if all other methods of interpretation have failed is a frequent feature of the jurisprudence of the Court.[5] Yet there seems to be no case on record in which the Court decided the issue exclusively on the basis of the principle of restrictive interpretation. In fact, the way in which it has formulated that principle has reduced to the minimum the likelihood of its application. No other result could be expected from such statements as that there is no room for restrictive interpretation unless all other means of interpretation have failed.[1] That latter contingency is hardly likely to arise—especially if recourse to preparatory work is acknowledged to be a legitimate means for ascertaining the intention of the parties. For, presumably, in laying down that recourse to preparatory work is permissible only when the treaty is not clear, the Court has not intended to proceed on the view that the rule of restrictive interpretation has sufficient potency to render clear what is otherwise a doubtful provision and thus make recourse to preparatory work unnecessary or illegitimate. As the principle of restrictive interpretation is applicable only when the treaty is not clear, it cannot be a factor which makes recourse to other means of interpretation unnecessary. This means, in particular, that prior to assuming that 'all other means of interpretation have failed' and that therefore the rule *in dubio mitius* has to be applied, the Court would have to exhaust the sources of information available in the preparatory work and the vast reservoir of judicial inspiration available in the principle of effectiveness of treaty provisions. Thus, for instance, in interpreting the provisions of the Convention of Paris of 1920 between Poland and Danzig—a treaty which, *inter alia*, imposed upon Danzig substantial obligations in the sphere of protection of minorities—the Court admitted that the provision in question was not 'absolutely clear'.[2] That circumstance did not lead it to interpret the Convention restrictively in favour of the 'natural liberty' and sovereignty of Danzig. Instead, it proceeded 'to recall here somewhat in detail the various drafts which existed prior to the adoption of the text now in force'.[2]

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[1] Series A, No. 1, p. 18.

[2] Ibid., at p. 25. See also to the same effect, and in almost identical terms, the case of the *Jurisdiction of the European Commission of the Danube*, Series B, No. 14, p. 36, and the case of *Exchange of Greek and Turkish Populations*, Series B, No. 10, p. 21.

[3] See below, n. 5.

[4] Series A, No. 1, p. 24.

[5] The case of the *Postal Service in Danzig*, Series B, No. 8, p. 40; case of the *Territorial Jurisdiction of the International Commission of the River Oder*, Series A, No. 23, p. 26; case concerning the *Competence of the International Labour Organisation to Regulate, Incidentally, the Personal Work of the Employer*, Series B, No. 13; case of the *Free Zones of Upper Savoy and the District of Gex*, Series A/B, No. 46, p. 167.

The International Court of Justice has not only refrained, apart from one doubtful exception,[3] from applying in actual practice the rule of restrictive interpretation. As will be shown presently, it has often relied, in a conspicuous manner, on the opposite of that rule by acting on the principle of effectiveness of treaty obligations and of the general purpose of the treaty as a whole. Yet the frequency with which it has conceded the theoretical relevance of the rule of restrictive interpretation has helped to keep it alive in some arbitral awards,[1] in the pleadings of the parties, and in the literature of international law. In view of the fate which the doctrine has suffered in practice at the Court's own hands, the question may properly be asked whether, quite apart from the absence of any inherent merits in the doctrine of restrictive interpretation, the continued reference, however nominal, to its potential usefulness is not a source of confusion which deserves greater discouragement than it has as yet received. What value—except a negative value as an element of confusion—can be attached to a rule of interpretation which, in the language of a carefully worded arbitral award, is to be resorted to only 'in the case of absolute impossibility of ascertaining the exact meaning' of a treaty?[2] Other arbitral decisions, while accepting it nominally, in effect refuse to follow it: 'Le fait que cet article consacre une limitation de l'exercice du droit de souveraineté impose le droit de l'interpréter strictement, mais ce devoir ne pourra jamais faire refuser à l'article le sens qui est commandé par des termes formels.'[3]

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[1] See, in particular, the manner in which the Court dealt with the argument of restrictive interpretation in the case of the *Territorial Jurisdiction of the International Commission of the River Oder*: '. . . This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States' (Series A, No. 23, p. 26).

[2] Series A/B, No. 44, p. 33.

[3] In the *Free Zones* case (Second Phase) (Series A, No. 24, p. 12)—but it is doubtful whether the question of interpretation of a specific treaty provision was at issue in that case.

With the rule that treaties must be interpreted restrictively on account of state sovereignty there is connected a cognate rule of construction to the effect that they must be interpreted, in case of doubt, against the party which was responsible for the drafting of the disputed clause—that they must be interpreted *contra proferentem*. The rule has not been prominent in international practice,[4] but, like many other rules of construction, has been conspicuous in text-books where it has been used occasionally as a reason, the cogency of which is not apparent, for substantiating the distinction between law-making and other treaties.[1] It has not been prominent in practice because, although—unlike the principle of restrictive interpretation in favour of the debtor—it constitutes a general principle of law,[2] in relation to treaties the rule can hardly be regarded either as persuasive or as being of considerable practical application. Treaties, except those imposed by force, are the result of common effort and the product of prolonged negotiations. They do not originate from drafts imposed by one party. Accordingly, in so far as a particular provision is based on a draft proposed by one negotiator, there is no imperative reason to credit that party with a degree of ingenuity and foresight which cannot be matched by the other party and which permits the implication that the *proferens* has provided fully for his own interests and that therefore the task of interpretation is to safeguard, by way of compensation, the interests of the other party. The following passage from the decision of the Arbitrator, given in 1934, in the dispute between Germany and the Governing Commission of the Saar in the matter of the *Interpretation of the Baden-Baden Agreement* concerning officials, illustrates this aspect of the rule *contra proferentem*:

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[1] See, for instance, the following passage in the award given in 1930 by Professor Borel, Sole Arbitrator, in the case of *The Kronprins Gustaf Adolf* between Sweden and the United States: 'Considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a Treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted in favour of the natural liberty and independence of the parties concerned' (*Reports of International Arbitral Awards*, United Nations, vol. ii (1949), p. 1254). And see the award of the Special Arbitral Tribunal of 3 September 1924 in the case of the *Reparation Commission* v. *German Government* (*Annual Digest*, 1923–4, Case No. 194), where the Tribunal held with regard to bilingual treaties that 'if there were two texts equally clear but not agreeing with one another, it would be arguable that the text involving the smaller obligation for the party obliged ought to be preferred. But if one text is clear and the other is not, the necessary solution is to interpret the less clear text in the light of the other text. . . .' See also the Dissenting Judgment of Judge Moore in the *Mavrommatis Palestine Concessions* case to the effect that in case of a difference of opinion as to the sense to be given to a term differently understood in the languages of the Contracting Parties, preference is to be given to the language of the country which is bound (*P.C.I.J.*, Series A, No. 2, pp. 69–70). See also the case of the *Radio Corporation*, above, p. 59. But see the award of the Arbitrator in *French High Commission to the States of the Levant* v. *Egyptian Government: Annual Digest*, 1941–2, Case No. 133 (at p. 423).

[2] *Georges Pinson* case, referred to above, p. 50.

[3] Award of Count van Sandenburg of 26 April 1926 in the Arbitration between *Germany and the Commissioner for Pledged Revenues: Reports of International Arbitral Awards* (United Nations), vol. iii (1949), p. 773.

[4] The Permanent Court of International Justice relied upon it on one occasion—in the *Brazilian Loans* case—in connexion with an instrument which was not an international treaty (*P.C.I.J.*, Series A, No. 21, p. 114). See also the Opinion of Parker, Umpire, in *The Lusitania* case (*Annual Digest*, 1923–4, Case No. 198); the decision of the Roumano-German Mixed Arbitral Tribunal, given in 1926, in *Weitzenhoffer* v. *Germany* (*Annual Digest*, 1925–6, Case No. 278); and the decision

> 'The rule that, in case of doubt, the text of a treaty is to be interpreted against the party which drafted it can only be applied when, as in the case of the Treaty of Versailles, one of the parties handed a prepared text to the other for signature. The Baden-Baden Agreement was the object of lengthy negotiations, precisely in regard to the question of officials' pensions, and the parties came to mutual agreement on their proposals step by step. In such a case, which party it was that drafted the final text is, from the standpoint of this rule of interpretation, irrelevant. . . .'[3]

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of the Arbitrator in *Goldenberg* v. *Roumania*, decided in 1928 (*Reports of International Arbitral Awards* (United Nations), vol. ii (1949), p. 907). And see *Annual Digest*, 1931–2, Case No. 206 (*Sch.* v. *Germany*), decided by the German Supreme Court in respect of the Treaty of Versailles.

[1] See Rousseau, op. cit., pp. 745, 762. And see, to the same effect, the submissions of French Counsel in *The Wimbledon* case (*P.C.I.J.*, Series C, vol. i, No. 3, pp. 172–4).

[2] See above, p. 57. See also Art. 1137 of the old and Art. 1730 of the new Italian Code. For comment on the former see Polignani, *Di un antica regola di diritto* ('*interpretatio contra stipulatorem*') in *Filangieri* (1881), pp. 1 ff. See also Art. 1162 of the French Civil Code; and see Williston, op. cit., § 621, who lays down in emphatic terms the rule that 'language will be interpreted most strongly against the party using it'. The rule is expressed in identical terms in Anson's *Principles of the Law of Contract*, chap. xi, § 1, the reason for the rule being that 'a man is responsible for ambiguities in his own expression, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing, more to his advantage'. For the suggestion that the clause is to be interpreted in favour of the party in whose interest it was inserted regardless of who inserted it, see Oertman, 'Interests and Concepts', in *The Jurisprudence of Interests* (ed. by Magdalena Schoch, 1948), p. 63. (See the judgment of the Germano-Polish Mixed Arbitral Tribunal in *Kunkel et al.* v. *Polish State*, which seems to have acted on that principle: *Annual Digest*, 1925–6, Case No. 279.) But the author admits that this is not the case when standardized forms of contract contain inconspicuous and apparently harmless clauses with the aid of which large business concerns, assisted by ingenious counsel, attempt to secure an advantage over their less adroit customers.

[3] *Reports of International Arbitral Awards* (United Nations), vol. iii (1949), p. 1564.

The doctrine of restrictive interpretation is not only of questionable value in itself. Once it has been adopted there is a tendency to generalize it and to apply it with special emphasis to selected categories of treaties. Thus it has been maintained that clauses conferring jurisdiction upon international tribunals must be interpreted restrictively seeing that they are in derogation of sovereignty.[1] The Permanent Court has said so occasionally—as in the case of the *Free Zones*[2] and of the *Phosphates in Morocco*.[3] Actually the practice of the Permanent Court of International Justice showed a clear tendency in the opposite direction. With the exceptions of the *Phosphates* case, in which the wording of the declaration of signature of the Optional Clause left little room for doubt, and of one aspect of the *Mavrommatis Palestine Concessions* case,[4] the Court interpreted jurisdictional clauses so as to assume jurisdiction rather than to deny it. On occasions it did so in a way significantly approaching judicial legislation. In the *Mavrommatis* case it assumed jurisdiction grounded in a treaty which had not yet entered into force at the time when the application submitting the case to the Court was filed; it did so for the reason that 'the Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law'.[5] In the same case it gave a very wide—not a restrictive—interpretation to the provision which conferred upon it jurisdiction only if negotiations had failed. It considered that abortive negotiations between the private party concerned and the defendant Government could be assimilated to negotiations between the two Governments in question. It expressed the view that it would be incompatible with the flexibility which should characterize international relations to require the two Governments to reopen a discussion which had in fact already taken place and on which they relied.[6] In the first phase of the case concerning *Certain German Interests in Polish Upper Silesia* the Court refused to be hampered 'by a mere defect of form'—that defect of form being such that it could be remedied at any time on the part of the plaintiff Government.[7] In the second phase of that case the Court went much further in interpreting extensively the clause conferring jurisdiction upon it. It held that jurisdiction given to it in the matter of the interpretation and application of the Convention gave it jurisdiction to decree and assess reparation in respect of the disregard of the obligations of the Convention. As reparation, it considered, was an indispensable complement of a failure to apply a treaty, it was not necessary that jurisdiction in respect of such reparation should be specifically provided for. Only 'an express provision to the contrary' could have excluded that implied jurisdiction of the Court.[1] In a less drastic manner, but equally by way of implication, the International Court of Justice held in the *Corfu Channel* case that the jurisdiction to determine the question whether there is any duty to pay compensation implied the competence to assess the amount of compensation. The Court held that the jurisdiction to decide what kind of *satisfaction* is due to *Albania* included the jurisdiction to decide the *amount of compensation* due to the *United Kingdom*.[2] In giving that interpretation of the Special Agreement the Court referred to the ruling of the Permanent Court of International Justice in the *Free Zones* case[3] in which it expressed the opinion that 'in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects'.

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[1] See Rousseau, op. cit., p. 688; Guggenheim, op. cit., p. 128.

[2] Series A/B, No. 46, p. 138.

[3] Series A/B, No. 74, p. 23.

[4] Series A, No. 11.

[5] Series A, No. 2, p. 34.

[6] Series A, No. 2, p. 15.

[7] Series A, No. 6, p. 14.

There is no trace in all these pronouncements or, what is more important, in the unambiguous instances of assumption of jurisdiction, of any restrictive interpretation of jurisdictional clauses. The opposite is the case—not to mention the numerous cases in which the Court assumed jurisdiction by virtue of the conduct of the parties such as submissions made in a counter-case.[4] It is not surprising that in a period during which the Court was in a general way expressing approval of restrictive interpretation of jurisdictional clauses while in effect acting in an opposite manner, an international arbitrator should have followed the practice of the Court rather than its general and qualified language and that he should have preferred expressly to dissociate himself from the view that such clauses must be interpreted restrictively. He said:

> 'The defendant government maintains that, in case of doubt as to the meaning of an arbitral clause, the incompetence of the Arbitrator must be presumed, according to the general rule by which a state is not obliged to have recourse to arbitration except when a formal agreement to that effect exists. The Arbitrator cannot agree with this principle of interpretation of arbitral clauses. Such a clause should be interpreted in the same way as other contractual obligations. If analysis of the text and examination of its purpose show that the reasons in favour of the competence of the Arbitrator are more plausible than those which can be shown to the contrary, the former must be adopted.'[5]

It would thus appear that the time is ripe for drawing the necessary consequences both from the inherent shortcomings of the doctrine of restrictive

[1] Series A, No. 9, p. 23.

[2] *Reports of Judgments, Advisory Opinions, and Orders*, 1949, p. 26. And see above, p. 54.

[3] Series A, No. 22, p. 13.

[4] See the case of the *Rights of Minorities in Upper Silesia* (Series A, No. 15, p. 24). And see the *Mavrommatis Jerusalem Concessions* case, where the Court considered that a declaration made by Great Britain in the course of the proceedings was sufficient to invest the Court with jurisdiction on one aspect of the dispute on which it could not otherwise have had jurisdiction to pronounce (Series A, No. 5, pp. 27–8).

[5] Undén, Arbitrator, in the case between Greece and Bulgaria concerning the *Interpretation of Article 181 of the Treaty of Neuilly of 1920* (4 November 1931): *American Journal of International Law*, 28 (1934), p. 773.

interpretation of treaties and from the circumstance that it has been more honoured in the breach than in the observance—in particular from the fact of the wide adoption of the principle of effectiveness of treaty obligations as an element of interpretation. These two principles—that of restrictive interpretation and that of effectiveness—are mutually incompatible. The more there is of one, the less there is of the other. The greater effectiveness of a provision can be secured, by dint of liberal interpretation, only at the expense of the freedom of action of the state bound by it—unless, of course, we limit severely, to the point of practical obliteration, the rule of restrictive interpretation by saying that it is applicable only when all other considerations, including that of effectiveness, have failed to produce a result. This, in fact, has been the practice of international tribunals.

IV. *The principle of effectiveness*

While, in the decisions of international tribunals, the doctrine of restrictive interpretation of treaties limiting the sovereignty of states has been no more than a form of words, the principle of effectiveness has played a prominent and ever-growing part in the administration of international law.[1] The principle of effectiveness in the interpretation of treaties appears in national and international jurisprudence in various forms. In the United States it has been repeatedly invoked and acted upon by the Supreme Court in the form of 'liberal interpretation'. In *Nielsen* v. *Johnson*, a case concerning a treaty limiting the right to levy discriminating taxes upon the property of aliens, the Court, citing a long line of precedents, said: 'When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred.'[2] In *Factor* v. *Laubenheimer*,[3] a case concerning extradition in relation to the requirement of double criminality, the Court used identical language—thus raising, incidentally, the question whether 'liberal interpretation' of the rights granted by the treaty refers to the rights of the state requesting extradition or to the rights of the person whose extradition is requested. In English jurisprudence and practice the term

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[1] For this reason it is not perhaps necessary to view with alarm the fact that there is an obvious inconsistency between the rule that treaty obligations ought to be interpreted so as to impose the minimum of obligation upon the party bound by it and the principle that provisions of a treaty ought to be construed so as to display a proper—if not the maximum—degree of effectiveness. For the same reason there is less harm than may appear at first sight in the fact that these two rules are often not only enumerated together in the same catalogue of rules, but that they follow one upon the other without any attempt at explaining what is on the face of it a contradiction. For the nominal character and ineffectiveness of the rule of restrictive interpretation tends to remove the inconvenience resulting from the inconsistency of the two sets of rules.

[2] (1929), 279 U.S. 41, 51–2. For a long list of decisions of American courts based on the principle of liberal interpretation see Hackworth, *Digest of International Law*, vol. v (1943), p. 256, and Hyde, op. cit., vol. ii, pp. 1478–80. On the question of liberal interpretation in favour of American Indians see *North-Western Shoshom Indians* v. *United States* (1945), 324 U.S. 335.

[3] (1933), 290 U.S. 276, 293–6, 300.

'liberal interpretation' seems to have been used in a somewhat wider sense as connoting generous rather than pedantic interpretation, in accordance with principles of good faith—though the dividing line between liberal interpretation thus conceived and the principle *ut res magis valeat quam pereat* is somewhat elastic. In fact in the sphere of municipal law the rule of effectiveness in the interpretation of contracts is so widely accepted that it may fairly be described as a general principle of law.[1]

International jurisprudence—and particularly that of the Permanent Court of International Justice and its successor—has constantly acted upon the principle of effectiveness as the governing canon of interpretation. This the Court has done in practically every sphere of its activity: in giving, notwithstanding occasional disclaimers to the contrary, a 'liberal' interpretation to clauses conferring jurisdiction upon it; in pronouncing, almost invariably, in favour of an interpretation extending the competence of international institutions such as the International Labour Organization or the international river commissions; and in construing, without exception, minorities treaties and similar obligations in a manner calculated to enhance their effectiveness and to limit, *pro tanto*, the freedom of states bound by the clauses in question. In the Advisory Opinion concerning *German Settlers in Poland* the Court declined to adopt a literal interpretation of the Minorities Treaty and to hold that the jurisdiction of the Council of the League ceased whenever it involved the interpretation of an international engagement other than the Minorities Treaty itself. If it were so 'the Minorities Treaty would to a great extent be deprived of value. . . . In order that the pledged protection may be certain and effective, it is essential that the Council, when acting under the Minorities Treaty, should be competent, incidentally, to consider and interpret the laws or treaties on which the rights claimed to be infringed are dependent.'[2] Similarly, when in the case of the *Acquisition of Polish Nationality*[3] the Court extended the protection of the Minorities Treaty to persons who were not Polish nationals—for the reason that 'if this were not the case, the value and sphere of application of the Treaty would be greatly diminished'—it did not act in accordance either with the plain meaning of the terms or with the principle of restrictive interpretation. In the Advisory Opinion concerning the *Minority Schools in Albania* it refused to give a literal interpretation to the clause providing for equality of treatment—an interpretation the result of which would have been that the clause 'would become a weapon by which the State could deprive the minority regime of a great part of its practical value'.[1] Neither did it rely on the doctrines of plain meaning or restrictive interpretation when in the Advisory Opinion on the *Competence of the International Labour Organisation* it held that the treaty which conferred upon the latter jurisdiction concerning the regulation of conditions of work of persons employed in industry bestowed upon it jurisdiction with regard to persons employed in agriculture;[2] or when it held that a treaty which gave it competence to regulate the conditions of work of employees entrusted it also with the jurisdiction to regulate the conditions of work of the employer when such jurisdiction was incidental to or necessary for the regulation of the work of employees.[3] The same applies to most of the cases in which the Court acted on the principle that it must give effect to the ostensible object of the treaty as it (the Court) saw it. As it said in the last-mentioned case: 'The Court, in determining the nature and the scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.'[3]

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[1] 'An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement' (*Ford* v. *Beech*, 11 Q.B. 866). For an emphatic example see *Simpson* v. *Vaughan* (1739), 2 Atk. 32, in which case it was held that where a man, for good consideration, gave a note expressed to be 'for money borrowed, which I promise never to pay', the word 'never' was rejected. And see generally in that sense on the principle of effectiveness *Chitty on Contracts* (20th ed. 1947), pp. 147–9; Williston, *A Treatise on the Law of Contract* (revised ed. 1936), vol. iii; *Restatement*, loc. cit., § 236. As to French law see Art. 1157 of the Civil Code, where the principle of effectiveness occupies the first place in the enumeration of rules of interpretation. See also Grassetti, *L'interpretazione del negozio giuridico* (1938), pp. 217–23, who discusses what he considers the apparent inconsistency between Art. 1132 which lays down the principle of effectiveness and Art. 1137 which sanctions *il principio del favor debitoris*.

[2] *P.C.I.J.*, Series B, No. 6, p. 26.

[3] Series B, No. 7, p. 17.

The issue thus raised brings into the forefront one of the cardinal questions of interpretation—that of the relation of the principle of effectiveness to the intention of the parties. If the intention of the parties was that the treaty should not be fully effective—if they intended that its clauses should be limited in their scope and operation—to what extent does it lie with an international tribunal to add to the efficacy of the treaty because of its own conception of international interest or of the purpose of the agreement? Undoubtedly, when confronted with an attempt at interpretation which, if accepted, would reduce the treaty to an absurdity or an empty form, the tribunal would have to do its utmost to prevent any such result from eventuating—although, as we shall see presently, contingencies may arise in which that negative result may constitute the nearest approximation to the intention of the parties bent upon producing a non-committal political declaration rather than a statement of legal rights and obligations. However, it is seldom that the unavoidable choice is between requiring a total frustration of the apparent purpose of the treaty and endowing it with a full measure of effectiveness in disregard of the intention of the parties. In the same way as, in another sphere, the choice is usually not between the simple alternatives of a literal interpretation or an interpretation leading to an absurdity, but between two opposing contentions neither of which is absurd, so also in this matter the choice is not between full effectiveness and utter frustration of the purpose of the treaty. The decision, as we have seen, is usually between a higher and a lower degree of effectiveness. If the parties have decided for the latter, is it within the province of a court—acting by reference to maxims of 'liberal' interpretation or of *ut res magis valeat quam pereat*—to bring about the former? There is really in such cases no question of choosing between *valeat* and *pereat*—the question is one of less or more *valeat*. The following four examples will illustrate the issue.

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[1] *P.C.I.J.*, Series A/B, No. 64, p. 182.

[2] Series B, No. 2.

[3] Series B, No. 13.

1. *The principle of effectiveness and finality of adjudication.* In laying down in the Covenant of the League of Nations the general principle of unanimity, the authors of the Covenant must have envisaged the possibility that because of that limitation the action of its organs, such as the Council or the Assembly, was bound on occasions to lack full effectiveness. This applied, for instance, to its action under Article 11—assuming that absolute unanimity, including the votes of the parties to the dispute, was required for the validity of resolutions of the Council. In the Advisory Opinion on the *Interpretation of the Treaty of Lausanne* the Permanent Court found that, notwithstanding the comprehensive language of the Covenant to the contrary, the principle *nemo judex in re sua* applied generally to the interpretation of the Covenant[1]—in particular to cases where the Council was asked to decide a dispute submitted to it not under Article 15 but by virtue of a treaty concluded between the parties. Otherwise, the Court held, the action of the Council in solving the dispute could not be fully effective. However, the requirement of unanimity under the Covenant did not deprive the action of the Council of all effectiveness. It left room for the display of the wide possibilities of conciliation and of the moral and political effect of recommendations and decisions reached by a consensus of opinion falling short of unanimity. Such result could not be as effective as a binding legal decision, but it was not altogether lacking in effectiveness. To what extent was it within the province of an international tribunal to add, by way of interpretation, to the efficacy of the action of the Council? If the principle *nemo judex in re sua* and the consequent requirement of qualified, as distinguished from absolute, unanimity of the Council applied to action of the Council in its capacity as an arbitrator, was there any compelling reason why it should not apply to Article 11 generally? The interpretation of arbitration agreements in a way calculated to ensure the finality of adjudication has not been limited to the International Court.[2]

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[1] Series B, No. 12.

[2] See, for example, the decision of the Swiss Federal Council of March 1922 in the *Boundary Dispute between Colombia and Venezuela: Annual Digest*, 1919–22, Case No. 262. And see ibid., 1929–30, Case No. 243 (*c*), for the award of Asser, Arbitrator, in the dispute between the

2. *The principle of effectiveness and the binding force of recommendations.* The powers of the Security Council under Chapter VI of the Charter of the United Nations are exercised almost exclusively by way of recommendations. The fact that these recommendations are not binding is undoubtedly calculated to diminish the effectiveness of the action of the Security Council. But it does not deprive them of all effectiveness. For they are of considerable moral and political value. They may have a legal effect in relation to the organs of the United Nations; if disregarded, they may become a powerful factor in the decision of the Security Council to proceed to enforcement action under Chapter VII of the Charter. But as the law now stands they are not legally binding and therefore far from being fully effective. In the course of the proceedings in the *Corfu Channel* case before the International Court of Justice it was urged by Great Britain that certain recommendations of the Security Council under Chapter VI were binding. It was asserted, *inter alia*, that such an interpretation was required by reference to the principle of effectiveness. The Court did not consider that submission. A considerable number of the judges found it necessary to refute it expressly.[1]

3. *The effectiveness of jurisdictional clauses.* As pointed out above,[2] the Court has held that jurisdiction to find whether the conduct of a state has amounted to a breach of an obligation of customary or conventional law implies also the competence to pronounce judgment on the reparation due by the offending state, and that the jurisdiction to pronounce on the question whether reparation is due implies also the competence to assess the amount of compensation. Otherwise, the Court held, the jurisdictional clause would lack effectiveness. Perhaps it would be more accurate to say that otherwise it would lack *full* effectiveness. For the finding that there was a breach of an international obligation would create the duty—the legal duty, to be fulfilled in good faith—to make reparation. As such it would not be without legal, not to mention moral and political, effect. The Court found—and it is not easy to challenge its finding with any confidence—that the principle of effectiveness required that one kind of jurisdiction implied the other. Similarly, it is conceivable, though perhaps not lightly to be assumed, that the parties—or one of the parties—in giving the Court jurisdiction to find whether it has violated an international obligation and whether therefore reparation is due, did not wish to endow it with the further jurisdiction to determine, because of the principle of effectiveness, the amount of reparation due to the other party. Effectiveness is a matter of degree. For, in the existing state of international organization and having

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Compagnie d'Electricité de Varsovie and the Municipality of Warsaw, in which he declined to sanction an interpretation of the Convention which would result in a duality of jurisdiction.

[1] *Reports of Judgments, Advisory Opinions, and Orders*, 1948, pp. 31–2.

[2] See p. 66.

regard to the terms of Article 94 (2) of the Charter, there is no assurance that a binding judgment of the Court will be given full effect. However, it will be noted that in the case in question the decision of the Court was not based solely on the requirement of effectiveness.[1]

4. *The effectiveness of international organization.* The Advisory Opinion of the International Court of Justice given in 1949 in the matter of *Reparation for Injuries Suffered in the Service of the United Nations*, in particular in so far as it referred to the right of the United Nations to bring an international claim in respect of injuries done to its agents, relied largely on the principle of effectiveness.[2] The Opinion of the Court was based to a considerable extent on the view that it was necessary to render fully effective the purpose of Article 100 of the Charter in so far as it is intended to safeguard the international and independent character of the functions and status of the officials of the United Nations.[3] Yet it cannot plausibly be maintained that the right of the United Nations to bring claims in respect of damage suffered by its officials is essential to the fulfilment of the purpose of Article 100 of the Charter—although there ought to be no doubt that a right of that nature is beneficial to the fulfilment of that purpose. If the Opinion of the majority of the Court on the subject had run counter to a principle more firmly grounded in international law and deserving of greater respect than the rule of nationality of claims, it would have raised in a more conspicuous manner than it did the issue whether the function of interpretation can legitimately aim at extracting every possible element of effectiveness from international instruments.[4] It is arguable that once the Court had come to an affirmative decision in the matter of the international personality of the United Nations, its right to bring an international claim on behalf of its officials followed from the fact of its international personality without it being necessary to rely on the desire to make the Charter effective. International juridical personality implies the right to prosecute claims in the international sphere—an indirect reminder of the necessity of revising Article 34 of the Statute of the International Court of Justice which, in its present formulation, makes it impossible for the United Nations to bring before the Court a claim against a state even with the consent of that state.

The examples referred to above may help to draw attention to the complications of the principle of effectiveness as an element in the interpretation of treaties and its relation to what is properly assumed to be the primary object of interpretation, namely, the revealing of the intention of the parties. The intention of the parties—express or implied—is the law. Any considerations—of effectiveness or otherwise—which tend to transform the ascertainable intention of the parties into a factor of secondary importance are inimical to the true purpose of interpretation. The answer, though perhaps not the complete answer, to that call for caution is that in applying the principle of effectiveness the Court does not supplant the intention of the parties and substitute for it a factor extraneous to it—especially if it is borne in mind that this is a principle applicable only when the intention of the parties is doubtful. The explanation may not be wholly satisfactory. For it leaves unanswered the question as to the degree of doubt which is required in order to render legitimate recourse to the principle of effectiveness. In particular, it leaves open the question whether the latter enjoys priority over other principles of interpretation. Moreover, it is idle to pretend that that particular presumption—that of effectiveness—follows invariably from the attitude usually adopted by states engaged in concluding treaties. Parties to treaties often wish their obligation to go so far and no farther. They—or some of them—desire the treaty to be only partly effective. They use language which, in their view, adequately expresses their determination not to concede to the treaty a full measure of realization of all its inherent and potential purposes.

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[1] See above, p. 54.

[2] The Court invoked specifically in support of its ruling the Advisory Opinion of the Permanent Court of International Justice, referred to above, in the matter of the right of the International Labour Organization to regulate, incidentally, the conditions of work of employers—an Opinion based, in turn, upon the same principle.

[3] See, in particular, for an emphasis of this aspect of the question, the statement made before the Court by Mr. Fitzmaurice (United Kingdom) on 9 March 1949: *International Court of Justice, Pleadings, Oral Arguments, Documents*, 1949, pp. 123–6.

[4] See above, pp. 54, 55.

On the other hand, in interpreting treaties it seems legitimate to act on the view that in availing themselves of the faculty of entering into treaties Governments intend to pursue a purpose which, in accordance with the requirement of good faith, treaties must be considered to fulfil. If parties—or a party—abuse that faculty by reducing it to the level of a device calculated to deceive one another, or to mislead others, they cannot rule out the contingency that the judge will attach to words a meaning usually associated with them. Nothing save explicit language will reduce the incidence of that risk. Once an instrument has assumed the form of a treaty, signed and ratified, good faith requires that, in the absence of compelling reasons to the contrary, it should not be treated as a non-committal enunciation of principle. That consideration is the reason for such superiority as the principle of effectiveness as an element of interpretation enjoys over the doctrine of restrictive interpretation and other rules of construction. But it is a superiority which must be invoked sparingly if international tribunals are not to incur the reproach of acting as legislators in a manner which is outside their legitimate province and which, in the long run, must react unfavourably upon their power and authority. Some inarticulate legislative element there must be in their activity, as there must be in the judgments of national courts. This applies to the application of both conventional and customary law. The judicial function is not that of an automaton which registers a gap, an obscurity, an absurdity, a frustrated purpose, without an attempt to fill the lacunae by reference to the intentions of the parties in the wider context of the agreement as a whole and the circumstances accompanying its adoption, to the needs of the community, and to the requirement of good faith. In particular, in cases of doubt it may not be improper to rely on the rule of effectiveness so as to promote the operation of general principles of law and of the rule of law in international society. But, as within the state, that quasi-legislative function ought not to be so deliberate or so drastic as to give justifiable ground for the reproach that the tribunal has substituted its own intention for that of the parties. Moreover, on occasions there may be a certain deceptiveness in the suggestion that the provisions of a treaty ought to be interpreted so as to achieve the object intended rather than to leave that object unfulfilled. For the question is: what is the object intended? Is it the aim contemplated by the parties or what the judge or arbitrator assumes ought to have been the purpose of the treaty? Views as to the object of certain categories of treaties undergo substantial changes in proportion as international relations are in a state of progress or retrogression. When the Permanent Court of International Justice in its Advisory Opinion on the *Minority Schools in Albania* considered the object of the Minority Treaties and Declarations to be the securing of a 'true equality' between the majority and the minority—an equality which, in its view, would not exist if 'the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority'[1]—it adopted a view of the purpose of protection of minorities which was not likely to secure support in the period following the Second World War when no room could be found for the recognition of the rights of minorities either in the non-committal Universal Declaration of Human Rights or in the drafts of more stringent instruments.

Undoubtedly, in so far as the rule of effectiveness is identical with the principle of good faith it has a full justification of its own and cannot be regarded as a technical or artificial rule of construction. But it is for that very reason that it must not deliberately be allowed to assume an existence independent of the intention, express or legitimately implied, of the parties. No rule or principle of interpretation is acceptable unless it proceeds from or acts upon that paramount consideration. In particular, no principle of effectiveness can properly endeavour to give legal efficacy to clauses or instruments which were not intended to produce such results. Thus, for instance, judicial activity could not legitimately aim at giving the force of a binding rule of conduct to Articles 16 and 38, respectively, of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes which laid down that 'in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognised by the signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle'. These provisions did not contemplate the assumption of the legal obligation to submit disputes to compulsory judicial settlement. They repudiated, in effect, any such obligation. This was also the position with regard to Article 12 of the Covenant of the League of Nations, which described as generally suitable for arbitration certain enumerated categories of disputes and which the Committee of Jurists who in 1920 drafted the Statute of the Permanent Court of International Justice interpreted as an implied obligation to submit such disputes to the Court. The same applies to the Universal Declaration of Human Rights which was approved in 1948 by the General Assembly of the United Nations. While professing to attribute to it a moral and political significance of the first order, practically all the Members of the United Nations declined to consider it as imposing upon them a legally binding rule of conduct. There would be no warrant for endowing it with legal effectiveness either directly or by the back-door of the assertion that it constitutes a legally binding interpretation of existing obligations of the Charter. Similarly, no considerations of effectiveness would provide a legitimate reason for reading a judicially ascertainable element of legal obligation into the declaration of the United States, made in 1946, accepting the compulsory jurisdiction of the International Court of Justice in certain categories of so-called legal disputes enumerated in Article 36 of the Statute of the Court. That declaration was made subject to the reservation, *inter alia*, of matters essentially within the domestic jurisdiction of the United States *as determined by the United States*. It cannot be made effective by judicial interpretation in cases in which the United States elect to deny the jurisdiction of the Court on account of that particular reservation.

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[1] Series A/B, No. 64, p. 17.

V. *Interpretation in the absence of a common intention of the parties*

An attempt has been made in the preceding section to show that the intention of the parties must be the paramount factor in the interpretation of treaties and that studied caution must be exercised in acting upon rules of interpretation, including those of such apparent attractiveness as the principle of effectiveness, which may play havoc with the intention of the parties. Such rules may, upon analysis, prove to be little more than presumptions. To presume—to imply—intention is to predicate that intention does not matter. To do that without circumspection would be to introduce into the work of interpretation an element of wide and uncontrolled discretion inconsistent with the legitimate exercise of the judicial function. At the same time there must be envisaged situations in which an international tribunal, faced with the duty of interpreting a disputed provision of a treaty, is not in a position to do so by reference to the common intention of the parties for the reason that, in relation to the particular provision, there is no such common intention. This does not mean that the treaty falls to the ground and that no question of interpretation arises at all. While common intention, if it can be ascertained, is the governing factor which must not be sacrificed to presumptions and technical rules of construction, it does not necessarily follow that the existence and the express manifestation of a common intention in relation to any specific provision of a treaty are an essential condition of its operation. It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified, is more than the expression of the intention of the parties. It is part of international law and must be interpreted against the general background of its rules and principles. It is part of the legal system and, as such and in the absence of a clear intention of the parties to the contrary, it allows of no gaps resulting in the impossibility of an adequate judicial decision. That absence of an effective common intention of the parties may occur, primarily, in the following five ways.

In the first instance, there may be no common intention for the reason that the parties, although using identical language, did not intend the same result. Such cases may be due to the fact that the parties, acting in good faith, attached differing meanings to the language of the treaty. Thus, for instance, a party may have attached to a term a meaning dictated by the peculiarity of its own language or of its own law or practice; the other party may have done the same. Or, when a map is attached to a treaty, one of the parties may have considered the map to be in the nature of a general identification of the territory in question while the other may have viewed it as exhaustively describing the boundaries, the islands, the creeks, and so forth. In such cases it would be idle to speak of the common intention of the parties, and the judge may legitimately have recourse to what may be considered the common intention of the treaty taken in its entirety, by reference to the historical circumstances of its creation, to its object as ascertained by the general tendency of its clauses, and, in cases of discrepancy of versions in different languages, to an analysis of the history of the adoption and of the meaning of all relevant versions.[1] Such wider considerations may be more useful than controversial technical rules such as that each party is bound only by the text in its own language.

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[1] See the method adopted by the Permanent Court of International Justice in the case relating to the *Competence of the International Labour Organisation* (Series B, No. 2, pp. 35 ff.) and in the *Mavrommatis Palestine Concessions* case (Series A, No. 2, pp. 19, 20).

Secondly, it is possible that the different meanings attached to the same expression by the parties to the dispute is due not to an accident but to the deliberate design of one or more of the parties bent upon benefiting from an ambiguity surrounding the expression or provision which it succeeded in having inserted—or which it allowed to be inserted—in the treaty without the other party being aware of the pitfall thus prepared for it or waiting for it.[1] The chapters on Interpretation in Grotius and Vattel abound in examples of this character. It is not unavoidable in such cases to have recourse to the principle that mistake induced by the active fraud or deceitful acquiescence or misrepresentation of one party is, at the option of the injured party, a cause of nullity. For there is hardly a question of mistake in cases of such absence of common intention as can be reduced to an instance of ambiguity. In such cases the principle of good faith and consideration of the general purpose of the treaty may legitimately provide a substitute for any lack of common intention. The principle of good faith impels the assumption of a common purpose. Thus in the case, referred to above, of the *Interpretation of the Special Agreement between Great Britain and Albania of March 1948*, it was possible that at the time of the signature of the Agreement the Albanian representatives, while being under no illusion as to the comprehensive interpretation—which, in the circumstances, was the natural interpretation—given to the Agreement by the British representatives, envisaged the possibility of and eventually relied upon a restrictive construction of the terms used.[2] To that extent there did not exist a common intention of the parties on the particular subject. Yet, independently of the other reasons given by the Court,[3] such common intention could legitimately be assumed from the provisions of the Special Agreement as a whole.

Thirdly, and this is one of the most typical aspects of the subject here discussed, the absence of an effective common intention may be due to the circumstance that, being unable to reach an agreed solution, the parties are content to use an ambiguous or non-committal expression and to leave the divergence of views to be solved in the future by agreement or in some other way. Some examples will illustrate the issue. In the negotiations preceding the Treaty of Lausanne of 1924 the parties were unable to agree on the question of the exercise of jurisdiction over aliens for offences committed abroad. They accordingly postponed the settlement of the controversy on that point by inserting a non-committal phrase to the effect that such jurisdiction shall be exercised in accordance with international law. It fell to the Permanent Court of International Justice, in *The Lotus* case,[1] to resolve the difficulty. Similarly, in the same Treaty the parties, unable to agree either on the delimitation of the boundary with Iraq or on entrusting the decision on the subject to a final award of an impartial body, adopted a formula which left the latter question in abeyance. That question came before the Permanent Court of International Justice when it was requested to give its Twelfth Advisory Opinion.[2] When the Definitive Statute of the Danube was being drafted, Roumania declined to concede to the Danube Commission the right to exercise jurisdictional powers. The Statute as adopted did not resolve the difficulty. It reflected the divergence of views on the subject. When the Permanent Court was asked to give an Advisory Opinion[3] on the *Jurisdiction of the European Commission of the Danube*, it was maintained by Roumania that the intention of the parties was to perpetuate their disagreement on the question—a contention which, in view of its practical consequences, the Court declined to accept. The Charter of the United Nations abounds in examples of deliberate ambiguities concealing the absence of an effective common intention of the original Signatories of the Charter on the questions at issue. It is sufficient to mention the terms of Article 79 of the Charter which provided that 'the terms of trusteeship' for each territory to be placed under the trusteeship system '. . . shall be agreed upon by the States directly concerned'. It was clear at the time of the adoption of that article that there was no agreement as to the meaning of the term 'States directly concerned'.

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[1] It is this aspect of the situation which brings to mind the drawbacks of any rigid reliance upon the rule *contra proferentem*. See above, p. 64. There is, consistently with good faith, no room for its application if it can be shown that the party which produced the draft containing the ambiguous expression acted in all innocence whereas the other party, hoping and intending to reap an advantage from the ambiguity, allowed or encouraged its incorporation in the treaty.

[2] See above, pp. 54, 55.

[3] Ibid.

In all these, and similar cases, although the common intention of the parties may have been to avoid giving a definite meaning to the clauses in question—that is to say, although there was no common intention of the parties to adopt a positive and clear-cut solution on the particular subject—it is the right and duty of international judicial and arbitral agencies to impart an effect to these clauses by reference to the purpose of the treaty as a whole and to other relevant considerations, including the finality of adjudication. *Interest rei publicae ut sit finis litium.* Undoubtedly the treaty is the law of the adjudicating agencies. But, at the same time, the treaty is law; it is part of international law. As such it knows no gaps. The completeness of the law when administered by legal tribunals is a fundamental—the most fundamental—rule not only of customary but also of conventional international law. It is possible for the parties to adopt no regulation at all. They may expressly disclaim any intention of regulating the particular subject-matter. But, in the absence of such explicit precaution, once they have clothed it in the form of a legal rule and once they have found themselves in a position in which that subject-matter is legitimately within the competence of a legal tribunal, the latter is bound and entitled to assume an effective common intention of the parties and to decide the issue. That common intention is no mere fiction.

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[1] Series A, No. 10.

[2] Series B, No. 12.

[3] Series B, No. 14.

The same fundamental considerations of the completeness of the law applies to the fourth aspect of the question here discussed—an aspect which is not unfamiliar in the interpretation of contracts generally.[1] While the common intention of the parties provides an effective basis for the interpretation of the treaty as a whole, it is possible that it affords no clue to the solution of any particular problem or difficulty which, demonstrably, did not occur to them when they concluded the treaty but which falls within the purview of its general provisions. The Permanent Court of International Justice was confronted with that question in its Advisory Opinion on the *Interpretation of the Convention of 1919 concerning the Employment of Women during the Night*.[2] The question before the Court was whether the provisions of the Convention applied to women holding positions of supervision or management in industrial undertakings. The Court pointed to the contention that the application of the Convention to women holding such posts had not been considered at the time when the Convention was adopted. The Court refused to admit the relevance of that argument:

> 'Even if this were so . . . it does not by itself afford sufficient reason for ignoring the terms of the Convention. The mere fact that, at the time when the Convention on Night Work of Women was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms.'[3]

The same considerations clearly applied to the Advisory Opinion on the *Competence of the International Labour Organisation to regulate, incidentally, the Personal Work of the Employer*.[4] The Court admitted that the treaty in question did not contain a provision expressly conferring upon the Organization jurisdiction 'in such a very special case as the present'. But it gave an affirmative answer to the question put to it for the reason that such competence of the International Labour Organization was essential to the accomplishment of the purpose of the Organization as revealed in its Constitution.

In these and similar cases the common intention in relation to the particular case must be derived from the common intention of the treaty as a whole—from its policy, its object, and its spirit. It is a matter of legitimate controversy, bordering on dialectics, whether in these cases we do not in fact treat intention as irrelevant—just as it may be a matter of dispute to what extent the function of courts in such cases assumes the complexion of an activity which is essentially legislative. However that may be, it is a function which no legal tribunal in a community under the rule of law can hope—or is entitled—to escape. It must not usurp it when it can be avoided; it must not stretch it beyond what is reasonably necessary. But, when confronted with it, the judge must face it—in effect, though not, perhaps, in form—with the same freedom which is enjoyed by the legislature or by the contracting parties. It is a freedom which may often be exercised with a foresight, responsibility, and detachment not given to law-making agencies proper. Gaps in the law—and resulting cases *primae impressionis*—are an unavoidable phenomenon. But that law, in its larger outlines and against its wider background, has its source in the will and in the interests of the parties to the dispute as interpreted by the judge by reference to their intention manifested by the treaty as a whole. That particular problem of interpretation is not confined to treaties. It is a general problem of interpretation. In a sense it is one of the main problems of construction. There is no difficulty in interpreting a provision relating to a situation which the parties had in mind when making the contract. The difficulty—the solution of which is within the true province of the judge—arises in relation to matters falling within the general terms of the agreement but not at all present to the minds of the parties when they negotiated it or put their signatures to it. It is in such cases for the judge to act on the implied intention of the parties, i.e. on his understanding, having regard to the contract as a whole and to surrounding circumstances, as to what would have been the attitude of the parties if confronted with the issue.[1]

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[1] On the other hand, the frequent artificiality and the nominal character of provisions of treaties constitute a peculiar feature of international relations, where the demonstration of a semblance of agreement is often considered preferable to an acknowledgement of unresolved differences.

[2] Series A/B, No. 50.

[3] Ibid., p. 377.

[4] Series B, No. 13.

Fifthly, there is an absence of effective common intention when two or more provisions of the same treaty are mutually inconsistent. This may occur in bilateral and, in particular, in multilateral conventions covering a great variety of subjects. The taking, in the midst of and after protracted negotiations, of rapid decisions which are often the result of a compromise or of appearance of compromise, is not conducive to consistency. But the judge confronted with the task of interpreting a provision the apparent meaning of which is contradicted by another provision of the same treaty, cannot confine his efforts to construing the isolated clause directly before him. He must view the treaty as a whole. He must, if only possible, assume an intention of the parties—an intention which is not self-contradictory. This may not always be feasible. Thus if the Constitution, in the form of a treaty, of an international organization were to lay down in a number of articles the duty of the organization and of its members to adopt a certain line of conduct and if the same Constitution, in another article or set of articles, were to remove the matter in question from the sphere of action of the organization, both sets of rules would, taken in isolation, convey a definite meaning. Taken together, they would amount to a contradiction which could only be resolved by a judicial decision giving preference to one or to the other set of provisions—assuming that the court had not previously arrived at the conclusion that, upon examination, there was no inconsistency or that any apparent inconsistency could not be resolved by reference to other provisions of the treaty. In deciding which object of the treaty is to be preferred the court will take into consideration the purpose of the treaty as a whole and what, in its view, is the relative importance of the provisions in question. In so doing the court—although deciding on legal as distinguished from political grounds—will be imputing rather than discovering a common intention underlying the treaty as a whole. A problem of this nature would arise, for instance, with regard to Article 2 (7) of the Charter—the clause of domestic jurisdiction—and its numerous provisions relating to human rights and fundamental freedoms. If, which is controversial, the latter constitute a legal obligation, to what extent is its effectiveness limited or rendered nugatory by the prohibition of intervention in Article 2 (7)—assuming, which is once more controversial, that the question of observance of human rights and fundamental freedoms is a matter essentially within the domestic jurisdiction of states? What is the position with regard to inconsistent versions in different languages—all being authentic—of the same provision? It is idle, in relation to a clearly ascertained contradiction, to speak of an effective common intention directly covering the matter at issue. The determination, in such cases, of the overriding—the higher—common intention of the parties, not less real because it is necessarily implied, may constitute an important aspect of the judicial function of interpretation—a timely and accurate reminder that that function, far from being limited to discovering the meaning of a text, may legitimately impart to it a meaning by reference to the paramount principle of the completeness and the rational development of the law and of the requirements of justice in the light of the purpose of the treaty viewed as a whole. This does not mean that the judgment thus given is based on

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[1] The treatment of the subject by Planiol and Ripert (op. cit., p. 514) with regard to French law clearly shows the general jurisprudential character of the problem involved—though it is possible that these writers tend to over-emphasize the legislative character of the function of the judge in such cases. The judge, in their view, acts in cases of that nature as if he were a legislator who supplements the law. He weighs the respective interests of the parties in the balance of justice and general interest as well as in the light of usage and the conduct of the parties. This is so even if he professes to follow strictly the intention of the parties. Similarly, they add, in the sphere of private international law the courts deduce the proper law of the contract from the intention of the parties although it is clear that there was no intention bearing on the matter. See also Salmond, *Jurisprudence* (8th ed. 1930), p. 185 n.

'political' considerations and that when confronted with a variety of possible interpretations the judicial decision is in the last resort a political act. For although there are many possible interpretations of a disputed provision there is in theory—in what is believed to be the accurate legal theory—only one correct interpretation of the law. The balance in favour of that correct interpretation may be indeed slight and the merits of alternative interpretations may be considerable, but to say that in every case there are a number of *equally* correct legal interpretations and that the choice between them is—legitimately, avowedly, and consciously—the result of a political decision and of political predilections of the judge[1] is to put forward an assertion which denies the very essence of the judicial function in a society under the rule of law. Undoubtedly, the judicial choice of the standard of interpretation may be influenced by a variety of factors seemingly extraneous to the text. But these factors—such as considerations of justice, canons of fairness and good faith, and, in proper cases, an equitable reconciliation of the interests at stake—are of legitimate legal relevance. They do not obliterate the border line between the function of the judge and the powers of the legislator.

VI. *Conclusions*

The discussion, in the last two sections of this article, of the principle of effectiveness and of the relevance of the common intention of the parties appears, on the face of it, to be inconclusive. It is hoped that that inconclusiveness will not be attributed solely to the indecision of the writer. For the matter there discussed neither permits nor calls for excess of assurance. It touches upon one of the most controversial and elusive problems of jurisprudence—the nature and the limits of the judicial function. That function consists largely in the interpretation of the law, whether laid down in statutes or in agreements. In the international sphere the problem is complicated by a number of factors such as the frequent absence, for a variety of reasons, of a common intention of the parties bearing directly upon the subject of the dispute and the similarly frequent fact of the positive intention of the parties to the treaty to deny to it what would appear to be a natural degree of effectiveness. The chief of these reasons is that, unlike the case of contracts in the sphere of municipal law, treaties, or some of their provisions, are often a political substitute for rather than a legal expression of the agreement of the parties. In the circumstances it will perhaps be more useful to draw attention to the salient features of the problem here discussed rather than to attempt a rigid summary of conclusions.

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[1] See Kelsen, *The Law of the United Nations* (1950), Preface, p. xvi. The very notion of interpretation conceived as a scientific and critical task is based on the assumption that, although there are a number of possible interpretations of the law, some of them are, in terms of legal relevance, more accurate than others and that it is the business of the judge to choose the most accurate of all. This implies the possibility—and the necessity—of one interpretation being the most accurate having regard to all pertinent legal considerations.

Unlike the rule of restrictive interpretation of international obligations, the principle of effectiveness constitutes a general principle of law and a cogent requirement of good faith. It finds abundant support in the practice of international tribunals. On the other hand, the principle of effectiveness is in the last resort no more than an indication of intention, to be interpreted in good faith, of the parties. It is the intention of the authors of the legal rule in question—whether it be a contract, a treaty, or a statute—which is the starting-point and the goal of all interpretation. It is the duty of the judge to resort to all available means—including rules of construction—to discover the intention of the parties; to avoid using rules of interpretation as a ready substitute for active and independent search for intention; and to refrain from neglecting any possible clues, however troublesome may be their examination and however liable they may be to abuse, which may reveal or render clear the intention of the authors of the rule to be interpreted.

Accordingly, with regard both to the question of effectiveness and to other matters, there would seem to be no merit in an attitude or doctrine which, in view of the difficulties attendant upon the discovery of the authors or of the fact of intention, discards it altogether and concentrates exclusively upon what is considered the plain text of the rule. Undoubtedly, when confronted with a statute the judge may find it difficult to determine whose intention it is that must be interpreted. Is it that of the members of the government who brought forward the measure; or of the amorphous, docile, and often self-contradictory mass of the supporters of the measure; or of the officials who drafted it; or of the particular interests and organizations which prompted it? Similar difficulties arise in the case of multilateral treaties. But to assert, on that account, that intention is irrelevant and that what matters are the 'plain words' of the text, is, in the long run, to divest the task of interpretation of its scientific character and its true purpose. Words have no absolute meaning in themselves. They are an expression of will. That will is not the will of the judge. There is latent in any consistent doctrine of 'plain meaning' the danger of the substitution of the will of the judge for that of the parties. Undoubtedly, the judge's notions of the purpose of the law, of right and wrong, of convenience, of the social consequences of any particular construction, and of an equitable apportionment of the interests of the parties may often be the decisive factor in the situation, but they may be so legitimately only as an element in the interpretation of the meaning of the statute or treaty. The law-creating autonomy and independence of judicial activity may be an unavoidable and beneficent necessity. But they are so only on condition that the judge does not consciously and deliberately usurp the function of legislation. That fact sets a natural limit even to a principle as cogent as that of effectiveness. It is a principle which can give life and vigour to an intention which is controversial, hesitant, or obscure. It cannot be a substitute for intention; it certainly cannot claim to replace it.

These considerations are of particular importance in relation to international judicial and arbitral settlement. The jurisdiction of the International Court of Justice—and of other bodies and persons administering international law in the international sphere—is still, in principle, of a voluntary character. Any justifiable impression that it either relegates the intention of the parties to a factor of secondary importance or that it simplifies unduly the task of discovering the intention of the parties must, in the long run, impair the scope and usefulness of their activity and the authority of their pronouncements. Thus, for instance, no international tribunal could properly attempt the task of amending the Charter of the United Nations—by reference to considerations of effectiveness or otherwise—for the reason that, as framed by its authors, some of its provisions are unworkable, or are liable to be abused, or are in fact abused.

In comparison, the rules concerning the restrictive interpretation of treaty obligations do lend themselves to summary by way of conclusions. The principle of restrictive interpretation of contractual obligations is not a general principle of jurisprudence. It is due to a large extent to the historical peculiarities of *stipulatio* in Roman law. It is of doubtful—if any—application in other systems of law. In the matter of treaties it has received no substantial support either from international tribunals in general or from the International Court in particular. It has been discouraged as a matter of both practice and principle. Such occasional endorsement as it has received has been purely nominal. For its application has been made dependent upon the double condition of doubt and of the complete absence of any other means of interpretation. The same applies to treaty obligations conferring jurisdiction upon international tribunals. These obligations the Court has interpreted in accordance with the principle of effectiveness and with conspicuously scant respect for the rule *in dubio mitius*. Such element of justification as the doctrine of restrictive interpretation possesses lies in the domain of burden of proof and of the emanations, which are of little relevance in the sphere of international law, of the rule *contra proferentem*. In so far as there is a case—and there is some case—for eliminating unnecessary and cumbersome rules of interpretation, that relating to restrictive interpretation of treaty obligations ought to be considered as first on the list of priorities. The aggregate result of rules of interpretation is probably to hinder rather than to promote the proper fulfilment of the task of the judge. It is not only that occasionally they tend to obscure the intention of the parties instead of clarifying it. The more frequent occurrence is that they help to cloak with an appearance of orthodoxy and soundness an unwillingness or inability to inquire, in all requisite detail and with all requisite vigour, into all the material factors pointing to the intention, express or implied, of the parties or the legislator. However, the remedy is not to assail rules of interpretation in general. The more helpful approach is to examine individual rules in the light of principle and of their application in practice.

TREATY RELATIONS OF BRITISH OVERSEAS TERRITORIES

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I. *Introductory*

While the treaty relations of the independent members of the Commonwealth have been often analysed through all the phases of their emergence from colonial status to independence,[1] little attention has been given by writers to the contemporary treaty relations of British non-self-governing territories. The object of the present article is to consider in this connexion the constitutional and international status of British non-self-governing territories; the past and present modes of their participation in international agreements; and the conditions of their membership of the recently created international organizations, in which they may be separate members or be represented by the United Kingdom as the metropolitan territory responsible for them, in so far as these conditions are determined by treaty. However, before proceeding it may be convenient to clarify some preliminary questions of terminology. The first concerns the meaning of the expression 'non-self-governing territory', which is to be found in the United Nations Charter. Non-self-governing territories are not precisely described or listed[2] in the Charter, which devotes three important chapters to them. Chapter XI is entitled 'Declaration Regarding Non-Self-Governing Territories'. It contains two articles, of which Article 73 provides:

> 'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, . . .'

Some of the language of this article echoes that of Article 22 of the League of Nations Covenant, which was concerned with the territories placed under Mandate, but Article 73 is more ambitious and its emotional overtones sharper. While Chapter XI is concerned to lay down the broad principles of government of 'territories whose peoples have not yet attained a full measure of self-government', Chapters XII and XIII of the Charter make special provisions for a limited class of these non-self-governing territories, that is to say, territories to which the trusteeship system applies. In none of these Chapters is there a definition of the status or character of non-self-governing territories, other than trust territories. But the description of a people as 'not having attained a full measure of self-government' is apt to express, and was doubtless intended to express, the facts that there are degrees of self-government and that a territory may be self-governing yet not fully independent.[1] This suggests the question whether the degrees of self-government may not fall to be determined by reference to the municipal law of the territory concerned, while its status of dependence or independence is governed by international law; this question will be considered below, in connexion with British non-self-governing territories. Yet there is nothing in Article 73 to suggest an answer even to this question or to require that a territory which has become self-governing[2] in every respect, save that a metropolitan territory is responsible for the conduct of its external relations, must be regarded as still non-self-governing for the purposes of Chapter XI, and in particular Article 73(*e*). This distinction between self-government and independence is, however, to be found also in British constitutional practice, by which colonies pass from the non-self-governing stage through a self-governing stage, when they are not yet internationally independent,[3] to independence. The independent members of the Commonwealth[4] are the United Kingdom and, in free and equal association with it, Canada, Australia, South Africa, New Zealand, India, Pakistan, and Ceylon.[5]

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[1] A very thorough and comprehensive study is to be found in Stewart, *Treaty Relations of the British Commonwealth* (1939).

[2] The Australian draft proposals at San Francisco in 1945 provided that the General Assembly should specify the territories to be regarded as non-self-governing for the purpose of Art. 73; but these proposals were not adopted and instead all Members of the United Nations were requested to say what were the non-self-governing territories subject to their jurisdiction. The replies were considered at the Second Part of the First Session of the General Assembly and a list of 74 territories, established for use in particular by the Special Committee on information, was submitted in accordance with Art. 73(*e*).

'Overseas territories' will be used here generally to denote those territories which are dependent upon the United Kingdom,[1] in that it is responsible for the conduct of their international relations: they comprise colonies, which are British possessions,[2] and protectorates, protected states, and trust territories, which are not. Colonies are British possessions which were acquired by settlement and are administered by the Crown in accordance with the provisions of the British Settlements Act, 1887,[3] or were conquered by or ceded to the Crown and are administered by the Crown under its prerogative powers or under a specific Act of Parliament. A British protectorate is not part of His Majesty's dominions and is therefore not a British possession, but foreign territory,[4] over which the Crown exercises jurisdiction under the Foreign Jurisdiction Act, 1890.[5] A British-protected state is a foreign territory, having a local ruler who has by treaty transferred responsibility for its external relations to the Crown.[6] Trust territories of the United Kingdom are territories which have been placed by the Crown under the trusteeship system of the United Nations, in accordance with Chapter XII of the United Nations Charter, and of which His Majesty's Government in the United Kingdom is the administering authority.

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[1] The use of the term 'independence' in this article was avoided by the Conference at San Francisco, apparently because it suggested the future creation of an unnecessarily large number of small states.

[2] The attainment of this stage may well be one of the 'constitutional considerations' in Art. 73(*e*), which would make it unnecessary for the metropolitan territory to continue to send information about it.

[3] At this stage they are sometimes described as 'Colonies possessing responsible government'; see, for example, Colonial Development and Welfare Act, 1940. Southern Rhodesia has possessed responsible government since 1923 (*S.R. & O.*, 1923, p. 1078) and Malta since 1947 (Malta Constitution Letters Patent, 1947). Malta appears in the list of territories contained in General Assembly Resolution 66(1) of 14 December 1946, referred to in footnote above; but since she passed out of the non-self-governing stage in 1947 that resolution is no longer applicable to her.

[4] See Statute of Westminster, 1931; India Independence Act, 1947; Ceylon Independence Act, 1947, and the declaration made at the Commonwealth Conference of Prime Ministers in April 1949. Already at the Imperial War Conference of 1917 and 1918 Mr. Massey was able to say: 'We are coming together as the United Nations of the Empire and on equal terms' (cited by Hancock, *Problems of Nationality*, vol. i (1937), p. 1. Was this the first coining of the phrase 'United Nations'?)

[5] Ireland ceased to be a member on 18 April 1949, and Burma left the Commonwealth on attaining her independence. India became a Republic on 27 January 1950, but remains a member of the Commonwealth.

The terms 'treaty' and 'treaty relations' are used in this article to mean any international agreement, whatever its form, and the rights and obligations created by it.

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[1] The position of the Isle of Man, purchased in 1765, and the Channel Islands, held by the Crown in virtue of its ancient title to the Dukedom of Normandy, is somewhat anomalous since they are not part of the United Kingdom nor are they 'British possessions' as defined by statute; but they are nevertheless part of His Majesty's dominions.

[2] As defined by the Interpretation Act, 1889, s.18(2) and (3). The expression 'overseas territories' is used here in place of non-self-governing territories since Malta and Southern Rhodesia are self-governing, though the United Kingdom continues to be responsible for them internationally.

[3] This Act provided that in any settlement not acquired by conquest or cession and not under the jurisdiction of a legislature, the Crown may establish laws, institutions, and courts, for the peace, order, and good government of the settlement, and all or any of these powers may be delegated to three or more persons within the settlement.

[4] *Rex* v. *Crewe, Ex parte Sekgome*, [1910] K.B. 576. The French courts appear to take a similar view of the status of French protectorates, but not all French publicists agree (see *Annual Digest*, 1933–7, Case No. 28 and appended Note, and ibid., 1933–4, Case No. 11).

[5] The distinction between a colony and a protectorate is one of constitutional law rather than of political fact; for purposes of government and administration protectorates have been broadly assimilated to the Crown colonies. For the status of British-protected persons see the British Nationality Act, 1948, and Mervyn Jones in this *Year Book*, 22 (1945), pp. 122–9.

[6] In 1891 the Government of India declared in respect of the Indian native states that 'the principles of international law have no bearing upon the relations between the Government of India as representing the Queen Empress of India on the one hand and the native states and the suzerainty of Her Majesty on the other. The paramount supremacy of the former presupposes and implies the subordination of the latter'. It may also be observed that after 1858 the Crown as suzerain power had the right of interference in the affairs of Indian native states in the case of misrule, breach of treaty obligations, or inter-state wars.

For decisions to the effect that Indian native states were not 'independent sovereign states' see *Superintendent, Government Soap Factory, Bangalore* v. *Commissioner of Income Tax* (Ceylon, Supreme Court), *Annual Digest*, 1941–2, Case No. 10 (Mysore State liable to income-tax); *Bishwanath Singh* v. *Commissioner of Income Tax* (India, High Court of Allahabad), ibid., Case No. 11 (Maharajah of Benares liable to income-tax on property held in British India).

II. *The constitutional position*

'The general law of the Commonwealth is not ordinary law. It lies rather on the periphery of municipal law, where it marches with politics, with constitutional convention and with international law.'[1] There is indeed a close similarity between some of the rules of Commonwealth constitutional law and those of international law; but it would be incorrect to identify them,[2] at least in their application to the relations between the United Kingdom and its overseas territories, and the similarity is worth attention in order that the basic difference between them may be discussed. Would it be possible to regard the classical description of settled and conquered or ceded colonies and the differences between them as created by conventional rules of international law, which have been adopted by or received into English law? There are several reasons why it cannot be so regarded. In the first place, it is doubtful how far rules in the matter had by the eighteenth century received the sanction of international agreement or whether their recognition in practice was not itself based in part on British colonial expansion up to that time. For was not British constitutional law and practice in the colonies a source rather than a derivative of international law? Secondly, the rules of international law which could be considered as creating the distinction were those governing the acquisition of territory rather than its status and form of government after acquisition; thus the stipulations of surrender or cession of territory to the Crown were never regarded as binding upon the Crown, unless they were embodied in a treaty to which the Crown was a party.[3] Thirdly, the fact that the colonies are not part of or even adjacent to the United Kingdom but are separated from it by vast tracts of ocean must not be taken to imply that the relations between them are international. This false implication has been wittily called 'the salt water fallacy', since it confuses geographical separateness with constitutional plurality. Fourthly, the sovereignty of the Crown and the supremacy of Parliament show that the relations between the United Kingdom and the colonies are internal, being governed by domestic law:[1] thus, 'no colony can be settled without authority from the Crown'.[2] In 1773 the House of Commons resolved that 'all acquisitions made under the influence of a military force, or by treaty with foreign princes, do of right belong to the State'.[3] An Act of Parliament in 1813 provided that 'nothing in this Act contained shall extend or be construed to extend to prejudice or affect the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the said territorial acquisitions'.[4] Again the powers of the Crown to perform acts having interterritorial effect between the colonies are to be found in a number of statutes.[5] The sovereignty of the Crown is reflected in the status of colonial governors: they are in no sense heads of state or even viceroys[6] but have only such powers delegated to them as are essential for the conduct of the government of the colony, these powers being limited by the terms of the Royal Commission and instructions to the governor, and by the constitutional practice of the colony. Further, the governor may be sued in the courts of a colony upon an act not done in his official capacity.[7] The paramount authority of Parliament is shown in its enactment of statutes of general application[8] in the United Kingdom and its overseas territories, and in the supremacy of its acts over those of colonial legislatures in cases of conflict.[9] It is clear therefore that international law is not to be regarded as forming part of the laws of England which govern the relations between the Crown of the United Kingdom and its colonies.

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[1] Latham, 'The Law and the Commonwealth', in *Problems of Nationality, 1918–1936* (1937). This penetrating and far-seeing study has been recently published as a separate volume.

[2] Ibid., p. 515, where it is observed of early colonial development that 'no rule of international law really affected decisions; and unless eighteenth-century Whiggery be reckoned the law of nature, there is little natural law in the colonies, though there is plenty of common sense'.

[3] E.g. terms of capitulation of Quebec and Montreal in 1759–60 embodied in Treaty of Paris 1763; and of the island of Grenada, ceded by the same treaty (discussed in *Campbell* v. *Hall* (1774), Comp. 204). But where terms of cession have been embodied in a treaty, their full effect is maintained even though the treaty has been made with communities which are not to be regarded as states in international law. See, for example, Western Pacific Order in Council, 1893, s. 22, which provided that the provisions of any treaty of His Majesty in force in respect of any place within the limits of the order should prevail over 'the law in force in England or anything contained in this order' in case of inconsistency. A similar rule is to be found in a protectorate: Nigeria Protectorate Order in Council, 1922, s. 12(1): 'Nothing in such ordinance or ordinances (sc. promulgated by the Governor) contained shall take away or affect any rights secured to any natives in the Protectorate by any treaties or agreements made on behalf or with the sanction of the Crown.' See Jessup, *A Modern Law of Nations*, p. 32.

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[1] 'The question of the extent of the Royal Prerogative (sc. over the island of Malta in 1937) . . . is a pure question of English Common Law' (*Sammut* v. *Strickland*, [1938] A.C. 678, at p. 697).

[2] *Campbell* v. *Hall* (1774), 20 S.T. 239.

[3] Cited by Holdsworth, *A History of English Law*, vol. x, p. 163.

[4] Sc. by the East India Company: 53 Geo. III, c. 155, 2. 95. While this principle did not go without challenge in the eighteenth century in its application to the Company, the subordination of the Company to the Crown (already remarked by Sir William Scott in *The Indian Chief* (1801), 3 C. Rob. 31, where he attributed its authority to the fact that it is 'a creation of this country') was confirmed by the courts in the nineteenth century (see decisions cited in this *Year Book*, 25 (1948), pp. 39–40).

[5] Colonial Prisoners Removal Act, 1869, s. 4 (prisoners may be removed for purposes of punishment from one colony to another by agreement between the governments of the colonies under sanction of an Order in Council); Turks and Caicos Islands Act, 1873, and Trinidad and Tobago Act, 1887 (exercise of power to attach territories possessing representative institutions to other colonies); Western Australia Constitution, 1890, s. 6, superseded by Commonwealth of Australia Constitution Act, 1900, s. 123 (power to divide the colony and create a separate colony or attach part to another colony); Colonial Boundaries Act, 1895 (power to alter colonial boundaries). A colony cannot by its own act join a union or federation (Keith, *Responsible Government in the Dominions*, p. 367).

[6] *Musgrave* v. *Pulido* (1879), 5 A.C. 102, and *Williams* v. *Howarth*, [1905] A.C. 51 (supplies voted by a colonial legislature are granted to the Crown equally with those voted by the Parliament of the United Kingdom).

[7] *Hill* v. *Bigge* (1841), 2 Moo. P.C.C. 465.

[8] For example, in the field of international law and conventions: Foreign Enlistment Act, 1870; Extradition Acts, 1870–1932; Territorial Waters Jurisdiction Act, 1878; Geneva Convention Act, 1911; Copyright Act, 1911; Air Navigation Act, 1920.

[9] Colonial Laws Validity Act, 1865, s. 2: 'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.'

It is perhaps more tempting to hold that the relationships between the United Kingdom and protectorates, protected states, and trust territories, are determined by international law. Protectorates are not British territory; they are administered under the Foreign Jurisdiction Act, 1890,[1] and the extent of the Crown's jurisdiction is conclusively determined in the English courts under that Act by a certificate of the Secretary of State for the Colonies.[2] But on the other hand the inhabitants of the protectorates are British-protected persons, that is to say, British nationals, and the territory of a protectorate is not foreign in the sense that it can be annexed at any time by the Crown.[3] Again, though trust territories are constituted by international instrument, the administering state is not the sovereign in the international sense. The law in force in the territory for all purposes is the domestic law of the administering state; and in the case of trust territories administered by the United Kingdom, the inhabitants are British-protected persons and the United Kingdom is responsible for the conduct of the international relations of the territories. So it is with most protected states.[4] We may conclude then that the United Kingdom and its overseas territories form a system which is governed in the relations between its parts[5] by domestic law, and which constitutes in international law a unitary state of which the Crown of the United Kingdom is the representative head.[6]

At the same time it must be borne in mind that all British possessions and protectorates have, in some degree, representative government.[7] While the legislature of each is subordinate to Parliament and subject to the authority of the Crown,[1] exercised by the Secretary of State for the Colonies, and to certain inherent limitations, there are many fields of legislation in which it is by constitutional practice free from intervention by the United Kingdom. The fields in which local bills must be reserved for the Crown's assent have been defined empirically,[2] and it is not possible to make a sharp dichotomy between external and imperial matters on the one hand and internal matters on the other. Lord Durham in his recommendations in 1839 upon the government of Canada said: 'The regulation of foreign relations, and trade with the mother country, the other British colonies, and foreign nations, and the disposal of public lands, are the only points on which the mother country requires a control.' But Lord John Russell did not accept so sweeping a statement. He pointed out that: 'There are some cases of internal government in which the honour of the Crown, or the faith of Parliament, or the safety of the State, are so seriously involved that it would not be possible for Her Majesty to delegate her authority to a ministry in a colony.'[3]

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[1] The earlier Foreign Jurisdiction Act, 1843, gave the Crown extraterritorial jurisdiction over British subjects in the Ottoman and Chinese Empires, and the native inhabitants of the hinterland of the Gold Coast; but it was gradually extended to administration generally, and responsibility for the territories concerned was transferred from the Foreign Office to the Colonial Office before 1890 (Wight, *The Development of the Legislative Council 1606–1945*, pp. 61–3).

[2] Contrast p. 90, n. 1.

[3] Thus Southern Rhodesia was annexed in 1923; and Kenya in 1920. The former was brought under British protection through the operations of the British South Africa Company, chartered in 1889, and the latter by the British East Africa Company, chartered in 1888 (Wight, op. cit.).

[4] See p. 88, n. 6, for the position in states under suzerainty.

[5] That is to say between the United Kingdom and the colonies, protectorates, and, for all administrative and judicial purposes, trust territories. But trust territories, protected states and territories under condominium, such as the Sudan and New Hebrides, are not to be regarded as parts of this 'unitary state'.

Compare the *inter se* doctrine applied to intergovernmental agreements made between the United Kingdom and the Dominions after 1919 (McNair, *The Law of Treaties* (1938), p. 210, and Stewart, op. cit., pp. 328–62).

[6] See Latham, loc. cit., p. 608, for a parallel distinction between two classes of constitutional convention within the Commonwealth (but mainly applicable to the relations of its independent members): 'conventions of status', to be understood in terms of municipal law; and 'conventions of co-operation', to be understood in terms of international law and practice.

[7] The following is a rough classification of these territories as at the beginning of 1949. The constitutional position is constantly moving forward and it is often very hard to say in which

The question whether a British possession or protectorate is to be regarded as self-governing in a particular field is therefore to be answered in the light of the instruments which may be controlling (Act of Parliament; Orders in Council, Letters Patent; Commission and instructions to the governor) and of constitutional practice, which requires that only in the most exceptional cases will the Crown disallow local legislation, or impose legislation by Order in Council,[4] or Parliament enact direct legis-

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class a particular territory would be placed; thus, Jamaica might in some respects be placed with Southern Rhodesia and Malta.

I. *Possessing responsible government*: Southern Rhodesia; Malta.

II. *Possessing representative government with an elected element*:

  (1) *having elected assemblies*: Barbados; Bermuda; Bahamas; Jamaica.

  (2) *having an unofficial majority*: Hong Kong; Mauritius; Sierra Leone, Colony and Protectorate; Northern Rhodesia; British Guiana; Gold Coast, Northern Territories and Ashanti; Kenya, Colony and Protectorate; Nigeria, Colony and Protectorate; Singapore; Gambia, Colony and Protectorate.

  (3) *having an unofficial minority*: Seychelles; Trinidad and Tobago; Leeward Islands; Dominica; St. Lucia; St. Vincent; Grenada; Gibraltar; British Honduras; Cyprus.

III. *Possessing representative government with a nominated element*: Fiji; Falkland Islands; Uganda, Protectorate; Nyasaland, Protectorate; Aden, Colony and Protectorate; Western Pacific Territories (Gilbert and Ellice Islands); British Solomon Islands, Protectorate; Pitcairn Islands (Tonga and New Hebrides); St. Helena; Sarawak; Somaliland, Protectorate.

Unclassified: Brunei; Zanzibar; Federation of Malaya; North Borneo; Basutoland; Bechuanaland; Swaziland.

[1] The Crown has no *legislative* authority in Bermuda, Bahamas, Barbados, Leeward Islands, and British Honduras.

[2] Thus, to take matters of international import, they include bills dealing with currency; differential duties; trade and shipping; defence; and bills containing provisions which appear to be inconsistent with treaty obligations.

[3] Cited by Hancock, op. cit., p. 23.

[4] For example, the application of provisions of the Ottawa Agreements, 1932, to Ceylon by Order in Council in 1934.

lation without prior consent of the territories concerned. Thus Dicey, writing about the time when the first self-governing colonies were coming to be known as Dominions, could say: 'The legislature of a self-governing colony is free to determine whether or not to pass laws necessary for giving effect to a treaty entered into between the imperial government and a foreign power; and further that there might be a great difficulty in enforcing within the limits of a colony the terms of a treaty . . . to which colonial sentiment was opposed.'[1]

We find then that there is an antinomy between the dependent status of the overseas territories and their capacity for self-government and it is in treaty relations that this antinomy shows itself.

III. *The treaty practice*

In the old treaties there is seldom any limitation of territories or persons and the rights and obligations arising from the treaty are to be deemed to extend to all British territories and attach to all British subjects. For example, Article 1 of the Treaty of Peace and Commerce between Great Britain and Morocco, 1761,[2] established 'peace between their lands, kingdoms, dominions and territories, belonging to or under the jurisdiction of either of them; and their respective subjects, people, or inhabitants, of whatever condition degree or quality they be shall reciprocally show to each other all friendship'.[3] The Treaty itself, however, may indicate its territorial application either by implication or by express words; for example the treaty may apply only to part of the United Kingdom, or to the United Kingdom without its dependent territories, or to one or more of its dependent territories[4] and not to the United Kingdom at all.

However, where there is a territorial limitation expressed in a treaty, the rights of British subjects are not necessarily limited to those belonging to the British territories covered by the Treaty.[5] Again, in a Treaty of Peace

[1] *Law of the Constitution* (9th ed.), p. 119. Compare Convention on Preservation of Wild Life in Africa, 1900, Art. VII: 'Les Parties contractantes se réservent de prendre, ou de proposer à leurs législatures coloniales autonomes, les dispositions nécessaires pour assurer l'exécution des stipulations de la présente Convention dans leurs possessions et colonies avoisinant la zone définie à l'article 1' (*State Papers*, vol. 94, p. 715).

[2] De Martens, vol. iv, p. 3.

[3] For similar language, see the Treaty of Versailles of 1783, which speaks of 'royaumes, états, provinces, pays, sujets et vaisseaux de quelque qualité et condition qu'ils soyent, sans exception de lieux ni de personnes'.

[4] See an old example in the Treaty of Amity, Commerce and Navigation, 1825, applicable to 'all the British Dominions situated out of Europe' (*Hertslet*, vol. iii, p. 56).

[5] Great Britain–Russia, Treaty of Commerce and Navigation, 1766 (de Martens, vol. i, p. 141): Art. XIV grants rights to Russian merchants in 'Great Britain and Ireland' and obtains reciprocal treatment for 'British subjects' in Russia. Similar provisions with limitation to territories of the high contracting parties 'in Europe' are found in Great Britain–France, Treaty of Commerce and Navigation, 1786 (ibid., vol. ii, p. 680), and in many treaties up to modern times: see, for example, use of the term 'British subject' in Article X of the Double Taxation Convention between the United Kingdom and the United States of 1945, where the term has been construed so as to include, *inter alios*, Canadian citizens.

of 14 December 1528 between Henry VIII and James V of Scotland, the island of Lundy in England and the Lordship of Lorne in Scotland were expressly excluded from the scope of the Treaty;[1] and in much later times[2] a curious Agreement was made with France which provided that 'the inhabitants of the towns of Halifax, Huddersfield, Leeds and Bradford' might send letters to France and through Paris to countries beyond by certain trains upon payment of a postal surcharge.

In the sixties of last century it was beginning to be recognized that a treaty concluded by the United Kingdom might not be applicable *ipso facto* in its overseas territories, and it was thought necessary to make express provision for the application of the treaty to 'all the Dominions and possessions'[3] of the contracting parties or to make local legislation, in the case of the self-governing colonies, a condition precedent to the entry into force of the treaty.[4] After the passing of the Extradition Act, 1870, a number of treaties were concluded which were made applicable 'to the colonies and foreign possessions' of the contracting parties.[5] About the same time Canada made representations to the Imperial Government that commercial treaties concluded by the United Kingdom should not be extended automatically to Canada; and the commercial autonomy of those colonies which were later to become, or form constituent parts of, the independent members of the Commonwealth, had by 1880 progressed far enough for a clause to be inserted in every commercial treaty concluded by Great Britain removing them from the scope of its automatic application. An early example of this clause is to be found in the Treaty of Commerce and Navigation with Italy, 1883,[6] where Article XIX provides:

> 'the stipulations of the present Treaty shall be applicable to all the Colonies and foreign possessions of Her Britannic Majesty, excepting to those hereinafter named, that is to say, excepting to India, Dominion of Canada, The Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia and New Zealand: provided always that the stipulations of the present Treaty shall be made applicable to any of the above-named colonies or foreign possessions on whose behalf

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[1] 'Sed Dominium et Insula praedicta intelligentur nullo modo in hac Treuga et hiis Guerrarum abstinentiis comprehensa' (cited by Schwarzenberger, 'International Law in Early English Practice', in this *Year Book*, 25 (1948), p. 63).

[2] 1865; *Hertslet*, vol. xiii, p. 398.

[3] Commercial treaties with Italy, 1863, and Austria, 1868.

[4] 'The present treaty shall take effect as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament of Great Britain and by the provincial Parliaments of those of the British North American Colonies which are affected by this Treaty on the one hand, and by the Congress of the U.S.A. on the other' (Treaty of Commerce of 1864 with the U.S.A. See also Convention on Preservation of Wild Life in Africa, 1900, cited on p. 93, n. 1).

[5] See Treaties with Brazil, 1872, Denmark, 1873, Belgium and France, 1876. It may be noticed that Art. XVI of the Convention with France assumed application of the Treaty to Colonies and foreign possessions but expressly reserves special arrangements made 'for the East Indian possessions' in a Treaty of 1815. Similarly, a Treaty of Commerce and Extradition with Portugal, 1878, was concluded in respect of 'The Indian Dominions' of the two Contracting Parties.

[6] *Hertslet*, vol. xv, p. 776.

> notice to that effect shall have been given by Her Britannic Majesty's representative at the Court of Italy to the Italian Minister of Foreign Affairs within one year from the date of the exchange of the ratifications of the present Treaty'.

This clause has a positive form in that it makes the provisions of the Treaty applicable to all overseas territories except those named or to be named. The Treaty with Paraguay of 1884 contains a similar clause but adds the significant words 'so far as the laws permit' which recall the terms of the treaty with the United States of 1864, and the list includes Newfoundland but excludes India. The Extradition Treaty with Colombia of 1888[1] provided in Article XVII: 'the stipulations of the present treaty shall be applicable to the colonies and foreign possessions of His Britannic Majesty, so far as the laws for the time being in force in such colonies and foreign possessions respectively allow'.[2]

A negative form of the clause, precluding the extension of the Treaty to any overseas territory except those named or to be named, is to be found in an explanatory protocol to a Treaty with Honduras of 1887, which was promulgated in February 1900;[3] and the same provisions were again embodied in the Treaty of Commerce with Nicaragua of 1905;[4] Article 20 of this Treaty provided that:

> 'the stipulations of the present treaty shall not be applicable to any of His Britannic Majesty's Colonies or possessions beyond the seas unless notice to that effect shall have been given, on behalf of any such colony or possession, by His Britannic Majesty's representative in the Republic of Nicaragua to the Nicaraguan Minister of Foreign Affairs within one year from the date of the exchange of the ratifications of the present Treaty. It is understood that, under the provisions of this Article, His Majesty's Government can, in the same manner, give notice of adhesion, on behalf of any British Protectorate or sphere of influence, or on behalf of the Island of Cyprus, in virtue of the Convention of 4th June 1878 between Great Britain and Turkey'.

In a Treaty of Commerce with Roumania of the same year there is a similar article but there is a reservation made[5] that most-favoured-nation treatment is to be extended to 'His Britannic Majesty's Colonies, Possessions or Protectorates', whether or not the Treaty is formally extended to them, upon conditions of reciprocity. This form of the clause was closely associated with the problem of separate withdrawal of overseas territories from treaties of the United Kingdom which had been or might be extended to them. It was recommended at the Ottawa Conference of 1894 that provision for separate withdrawal should be embodied in commercial treaties, and it was so done in the Convention of 1899 with Uruguay which declared that the

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[1] *Hertslet*, vol. xviii, p. 292.

[2] See ibid., vol. xxiii, p. 282, Treaty with Belgium, 1901, in which this limitation by reference to the local law does not appear.

[3] Ibid., vol. xxi, p. 668. Based on discussions at the Colonial Conference in Ottawa, 1894 (Stewart, op. cit., p. 101).

[4] *Hertslet*, vol. xxiv, p. 796.

[5] Art. 17; the so-called 'nevertheless' clause.

British colonies and possessions might accede separately to the Convention within six months of its entry into force but might withdraw from it upon six months' notice of that intention. Similarly, in the Treaty with Honduras cited above, the United Kingdom had the right 'to separately terminate the Treaty at any time on giving twelve months' notice to that effect on behalf of any British colony, foreign possession, or dependency, which may have acceded thereto'.

From the early years of this century similar clauses have been inserted in multilateral treaties. Thus Article 6 of the Convention for the Prohibition of Industrial Employment of Women at Night of 1906 provides that the Convention shall not be applicable to 'a colony, possession or protectorate' unless notification to that effect has been given to the Depository State by the Metropolitan Government. In later instances the clause generally has its positive form; thus in the Convention on Obscene Publications of 1923,[1] Article 13 provides that any League Member may on signing or adhering to the Convention 'declare that its signature or adhesion does not include any or all of its colonies, overseas possessions, protectorates or territories under its sovereignty or authority'; provisions follow for separate accession and withdrawal in respect of colonies. This Convention was signed on behalf of the 'British Empire' with a declaration of the total exclusion of India and the Irish Free State, which acceded separately. In the Convention on Arbitration Clauses of 1923,[2] there is a similar article which includes mandates. The signature of the British Empire[3] to this Convention was expressly limited to Great Britain and Northern Ireland and excluded all overseas territories. The Netherlands signed this Convention twice, for the 'Kingdom in Europe' and for 'the three territories beyond the seas'.

In this field the International Labour Organisation Conventions deserve special notice. In the Hours of Work (Industry) Convention, 1919, Article 16 provides:

> '(1) Each Member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, protectorates and possessions which are not fully self-governing—
>
> (*a*) except where owing to the local conditions its provisions are inapplicable; or
>
> (*b*) subject to such modifications as may be necessary to adapt its provisions to local conditions.
>
> '(2) Each Member shall notify to the International Labour Organisation the action

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[1] Hudson, *International Legislation*, vol. ii, p. 1060.

[2] Ibid., p. 1064.

[3] The use of the expression 'British Empire' in treaties was largely confined to the years 1919–26 and its precise meaning is not clear; thus Mr. Lloyd George signed the Treaty of Versailles for the 'British Empire' as a whole while separate signatures were *also* subscribed for each of the Dominions and India. Ratification, however, was withheld until the Dominion Parliaments had approved the Treaty. Compare Mr. Lloyd George's statement on the Washington Naval Conference of 1922: 'In addition to the signatures of the British delegation, the signature of each Dominion delegate will be necessary to commit the British Empire as a whole to anything decided at the Conference', quoted by Stewart, op. cit., p. 161.

taken in respect of each of its colonies, protectorates and possessions which are not fully self-governing.'

This form of clause appears in several International Labour Organisation Conventions. It not only gives the metropolitan government a wide discretion, but seems to leave it to be the judge of the applicability of the convention to a particular territory. Despite its appearance, the clause is really in the negative form. But in the Workmen's Compensation (Accidents) Convention, 1925, the clause is abbreviated to: 'Each Member of the International Labour Organisation which ratifies this Convention engages to apply it to its colonies, possessions and protectorates in accordance with the provisions of Article 35 of the Constitution of the International Labour Organisation.'[1] No such clause appears in the Minimum Wage Fixing Machinery Convention, 1928, though there is nothing in the records of the Eleventh Session of the International Labour Organisation to indicate why it was dropped. Similarly, there is no clause in the Forced Labour Convention, 1930, though this is perhaps to be explained by the intended universal character of the Convention itself. Article 3 provided: 'For the purposes of this Convention the term "competent authority" shall mean either an authority of the Metropolitan Territory or the highest central authority in the territory concerned.' However, in the Recruiting of Indigenous Workers Convention, 1926, there is a further change to an elaborate clause in the negative form, which provides as follows:

'(1) in respect of the territories referred to in Article 35 of the Constitution of the International Labour Organisation, each Member of the Organisation which ratifies this Convention shall append to its ratification a declaration stating:

(*a*) the territories to which it undertakes to apply the provisions of the Convention without modification;
(*b*) the territories to which it undertakes to apply the provisions of the Convention subject to modifications, with details of the said modifications;
(*c*) the territories to which the Convention is inapplicable;
(*d*) the territories in respect of which it reserves its decision.

'(2) The undertakings referred to in sub-paragraphs (*a*) and (*b*) of paragraph 1 of this Article shall be deemed to be an integral part of the ratification and shall have the force of ratification.

'(3) Any Member may by a subsequent declaration cancel in whole or in part any reservations made in its original declaration in virtue of sub-paragraphs (*b*), (*c*) or (*d*) of paragraph 1 of this article.'

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[1] The formulation of Art. 35 is itself of interest. The United States proposed 'that sovereign states Members of Federal States' should have the same status as the British Dominions if they possessed, as in the United States, special competence with respect to labour legislation. Had this been adopted each of the 48 states of the Union would have had the rights of separate membership in the International Labour Organisation; but the proposal was withdrawn and the present Art. 35 adopted on the basis of an Anglo-Belgian draft (see Sohn, 'Multiple Representation in International Assemblies', in *American Journal of International Law*, 1946, p. 71). The case of the native states of India may also be noticed; India's ratification of the Workmen's Compensation (Equality of Treatment) Convention, 1925, was expressly stated to apply only to British India.

This clause appears also in the Hours of Work (Sea) Convention, 1936, and other Conventions adopted at the 20th and 21st Sessions of the International Labour Organisation Conference.

The clause achieved a stable form in the multilateral treaties of this period, an example being Article 65 of the Sanitary Convention for Air Navigation, 1933: 'Any High Contracting Party may declare at the time of his signature, ratification, or accession, that his acceptance of this Convention does not bind any or all of his colonies, protectorates, territories beyond the sea or territories under his suzerainty[1] or mandate. In that event the present convention shall not apply to any territories named in such declaration.'[2]

Since 1945 the spate of multilateral treaties has brought new uses for the clause and new formulations. The old form appears, with slight changes, in the Protocol[3] amending the Convention on the Manufacture and Distribution of Narcotic Drugs of 1931. A new form was used in the Havana Charter for an International Trade Organization. Enumeration of the classes of overseas or dependent territories was dropped and they were defined simply as territories for which some state has 'international responsibility': thus Article 104, entitled 'Territorial Application', is in the positive form:

'(1) Each government accepting this Charter does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Organisation at the time of its own acceptance.

'(2) Any Member may at any time accept this Charter, in accordance with the provisions of paragraph 1 of Article 103, on behalf of any separate customs territory excepted under the provisions of paragraph 1.

'(3) Each Member shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Charter by the regional and local governments and authorities within its territory.'[4]

[1] That is to say, protected states and such territories as the Indian native states before 15 August 1947.

[2] For the form of such a declaration see that in the Narcotics Convention of 1931: 'His Majesty does not assume any obligation in respect of any of his colonies, protectorates and overseas territories or territories under suzerainty or under mandate exercised by his Government in the United Kingdom.'

[3] Art. 26: signed at Lake Success on 11 December 1946.

[4] This paragraph is a not wholly articulate attempt to deal with the constitutional problem presented by federal states, which was clearly stated by the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. 326: 'For the purposes of ss. 91 and 92 of the British North America Act 1867, i.e. the distribution of legislative powers between the Dominion and the provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.' The problem is analogous to that which the colonial application clause is designed to solve, and in some Federal states, e.g. the United States of America, it is not always easy to determine where the legislative power to give effect to a treaty

This form has been adopted in a number of Conventions[1] and it is to be observed that in most cases the form of the clause is negative,[2] that is to say, the Convention is not to apply to the overseas or independent territories unless a declaration so extending it is made under the provisions of the clause. Article XXVI(4) of the General Agreement on Tariffs and Trade of 1947 deserves special notice, for it brings out with exceptional clarity the principles underlying the clause; it reads:

> 'Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility; Provided that it may at the time of acceptance declare that any separate customs territory for which it has international responsibility possesses full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, and that its acceptance does not relate to such territory; and Provided further that if any of the customs territories on behalf of which a contracting party has accepted this Agreement possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.'

Some new departures should be noticed: first, some countries, while accepting the constitutional position, seek to bring pressure to bear on metropolitan territories to extend a convention to their overseas or dependent territories by having a clause inserted requiring the metropolitan

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in fact resides: see Art. 19 of the International Labour Organisation Constitution (as amended in 1944) and the 'Federal application clause' proposed by the United States of America to be inserted in the Human Rights Covenant (draft of Fifth Session of Human Rights Commission: U.N. Doc. E/1071).

[1] Genocide Convention, adopted by the General Assembly on 9 December 1948, Art. XII: 'Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible'; Narcotics Protocol, signed at Paris, 19 November 1948, Art. 8 ('territories for which it has international responsibility'); Customs Convention on Touring, Commercial Road Vehicles and International Transport of Goods by Road, signed at Geneva, 16 June 1949, Art. 2(2) ('territories for which it has international responsibility'). The Agreement on Visual and Auditory Materials of Educational, Scientific and Cultural Character, 1949, makes a not very intelligible distinction between territories for which a contracting state 'has international obligations' and 'any or all non-self-governing territories for which it is responsible', applying similar provisions to both.

A recent example of the clause is Art. 12(4) of the Convention on Declaration of Death of Missing Persons, prepared by the first Conference to be called by the General Assembly (6 April 1950): 'The word "State" as used in this Convention shall be understood to include the territories for which each State party to the present Convention bears international responsibility, unless the State concerned on acceding to the Convention, has stipulated the Convention shall not apply to certain of its territories. Any State making such a stipulation may at any time thereafter by notification to the Secretary-General of the United Nations extend the application of the Convention to any or all of such territories.' This clause is in the positive form.

[2] This is sometimes expressly brought out: thus Customs Convention on Touring, &c., Art. II (1): 'Signature of, or accession to, this Agreement, without a declaration to the contrary at the time of signature or accession, shall be regarded as having effect for the metropolitan territory only of the Contracting Government concerned.' See also Intergovernmental Maritime Consultative Organization Convention, Art. 58(*b*).

territory to make every effort to do so.[1] Secondly, in some cases special provision is made for the acceptance of a convention by the United Nations on behalf of a trust territory of which it may be the administering authority.[2] Finally, the Traffic in Women Convention, adopted by the General Assembly on 2 December 1949, explicitly rejects the colonial application clause in its traditional forms and provides for automatic application of the Convention to the overseas or dependent territories of states accepting it; thus Article 23 reads:

> 'The present Convention shall be open for signature on behalf of any Member of the United Nations and also on behalf of any other State to which an invitation has been addressed by the Economic and Social Council . . . for the purposes of the present Convention the word 'State' shall include all the colonies and trust territories of a State signatory or acceding to the Convention and all territories for which such State is internationally responsible.'

To summarize: In early treaty practice, special provision for the application of a treaty to the overseas territories is rare; but after 1880 the self-governing colonies asserted and obtained autonomy in commercial treaty relations, and the colonial application clause was inserted in bilateral treaties concluded by the United Kingdom in order to protect it. After 1900 the clause was widely used in multilateral conventions dealing with technical or administrative matters in which one or more overseas territories were in practice self-governing. Since 1945 there have been further important changes: first, the enumeration of overseas or dependent territories has been replaced by a description of them as territories for which some state, termed metropolitan, is 'internationally responsible'; this description is not wholly clear and is even circular, since the colonial application clause is designed to enable territories for which some state is internationally responsible to participate in treaties, but treaty participation is one of the elements in international responsibility; the colonial application clause therefore applies in effect to those territories 'to which it applies'. This circularity can be avoided if by international responsibility is meant responsibility for the diplomatic, that is to say, *formal*, conduct of foreign relations. Secondly, there is a growing movement in the United Nations to abolish altogether the principle underlying the colonial application clause, and this movement achieved its first success in the Traffic in Women Convention.

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[1] See, for example, the Convention on Road Traffic, signed at Geneva on 16 September 1949, Art. 28(2): 'Each Contracting Party, when circumstances permit, undertakes to take as soon as possible the necessary steps in order to extend the application of this Convention to the territories for the international relations of which it is responsible, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.'

[2] See, for example, the Convention on Road Traffic of 1949, Art. 27(4); Intergovernmental Maritime Consultative Organization Convention of 1948, Art. 58(*d*).

IV. *International organization*

From this review of the status of the overseas territories and treaty practice we can now derive three main principles:

In the first instance, the acceptance[1] of a Convention by the United Kingdom will *ipso facto* make it operative in the United Kingdom and its overseas territories, unless by express provision or necessary intendment the treaty is territorially limited to the United Kingdom or to one or more of the overseas territories;[2]

Secondly, the overseas territories are not independent, in the international sense, and do not have diplomatic relations with foreign states;

Thirdly, all the overseas territories which have responsible or representative government are in practice and in certain fields self-governing.

It is convenient here to emphasize that this article is concerned only with the United Kingdom and its overseas territories. Similar principles may also underlie, in whole or in part, the relationship of other states and their dependent territories, and the colonial application clause, when it is included in multilateral treaties, is of course designed to meet the constitutional requirements of all states having such territories—but it would be impossible within present limits to discuss the position in those states.

Three possible ways suggest themselves of providing for the application of a treaty, to which the United Kingdom is to become a party for its overseas territories: provision for application *ipso facto* upon acceptance of the treaty by the United Kingdom; provision for some or all of the overseas territories to become separate parties to the treaty; inclusion of the colonial application clause.

Where there is no express provision in the treaty itself, it becomes a question of interpretation whether it is to be read as applicable to the overseas territories as well as to the United Kingdom. Thus a parcel-post convention between the United Kingdom and Belgium must be construed, in the absence of any reference to overseas territories, as concerned only with parcels moving between the United Kingdom and Belgium. On the other hand, the United Nations Charter, which embodies political and social principles of a universal character, must be considered as extending to all overseas territories[3] and, though there is no colonial application clause, Chapter XI of the Charter implies it. The same rule governs the interpretation of all general political treaties, in which there is no express reference to overseas territories, since the conclusion of a general political treaty is of the essence of foreign relations and the very relationship between the overseas territories and the United Kingdom requires that they be bound by it.

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[1] 'Acceptance' denotes the legal act by which a state becomes party to a treaty, and is equivalent to accession, or signature and ratification.

[2] McNair, op. cit., pp. 76–9.

[3] And therefore, *semble,* conventions having the character of subordinate legislation under it: for example, the Convention on Privileges and Immunities of the United Nations, which was concluded by reference to Art. 104 of the Charter, must be presumed to have become applicable in the overseas territories by reason of the United Kingdom's acceptance of it.

However, where a clause is included in a treaty, as in the Traffic in Women Convention, which extends its operation to the overseas or dependent territories of states accepting it *ipso facto*, the United Kingdom is compelled either to delay its own acceptance of the treaty until such time as all its overseas territories have declared their willingness to participate in the treaty, or to accept it as soon as convenient to itself and in so doing disregard the third principle; for by acceptance it would assume international obligations in respect of certain territories which are self-governing on matters dealt with in the treaty, and these obligations could be executed only by an overriding legislative act of the Crown or of Parliament, if one or more of the territories concerned was unwilling to participate in the treaty.

Another solution would be for the overseas territories to become separate parties to treaties, and it is at first sight attractive; for it is possible to view the international responsibility of the United Kingdom for its overseas territories as subject to certain limitations. The fact that acceptance of a treaty is sent through diplomatic channels to the Depository State or the Secretary-General of the United Nations, must not obscure the true character of the participation of an overseas territory in a treaty to which the United Kingdom is a party;[1] the communication of acceptance through the diplomatic channel is a formality, and an overseas territory which is self-governing in the matters dealt with in a treaty is not the less essentially a party to that treaty merely because its acceptance is formally communicated by the metropolitan territory responsible for its foreign relations; for example, Southern Rhodesia is a separate party to the General Agreement on Tariffs and Trade and to certain of the protocols made under it, though the formalities of its participation are executed by the Government of the United Kingdom at its request. The expressions 'international responsibility' and 'responsibility for the conduct of foreign relations' are indeed forms of description and not of definition.

Accordingly, where the other states negotiating a treaty consent, and one or more overseas territories are self-governing in respect of the matters dealt with in the treaty, there is no reason why these territories should not become separate parties to the treaty, it being understood that the formalities will be executed by the United Kingdom. This principle has been applied in a number of recent treaties creating international organizations,[1] and a distinction is emerging between the participation of overseas territories in a treaty, in so far as it confers rights and obligations upon them, and their membership of any international organization which that treaty creates. Thus the Convention on the Intergovernmental Maritime Consultative Organization provides in Art. 9:

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[1] Compare the relationship between Liechtenstein and Switzerland; the latter is responsible for the *formal* conduct of Liechtenstein's foreign relations, but the decisions of policy, of when and how to act, remain those of Liechtenstein.

> 'Any territory or group of territories to which the Convention has been made applicable under article 58, by the member having responsibility for its international relations or by the United Nations, may become an associate member of the Organisation by notification in writing given by such member or by the United Nations, as the case may be, to the Secretary-General of the United Nations.'[2]

These provisions for associate membership, similar to those of the World Health Organization, are not followed in the Convention of the World Meteorological Organization or in the Havana Charter for an International Trade Organization; both these instruments open the door of full membership to overseas territories, certain requirements being met.[3]

There are certain points of interest in these recent treaties which may be conveniently mentioned in this connexion: in the World Health Organization and International Maritime Consultative Organization the anomalous concept of 'a group of territories' becoming associate members of these organizations is used; this recalls the 'ensembles' of overseas territories recognized as forming part of the Universal Postal Union and as having a right of separate representation at the Universal Postal Congress. This concept is best understood if the group of territories is regarded as a unit for the purposes of the services with which the Organization is concerned; it is in fact an administrative rather than a legal or constitutional concept. From this follows the second point, that this administrative concept may be used actually to define the conditions of membership of an overseas or dependent territory: thus in the World Meteorological Organization the conditions of membership for a territory 'not responsible for the conduct of its international relations' are that the Convention has been applied to it under the colonial application clause (Art. 34) by the state so responsible; that it 'maintains its own meteorological services'; and thirdly, that its request for membership has been presented by the Member responsible for its international relations and approved by two-thirds of the Members of the Organization. The administrative concept in the Havana Charter is that of 'a separate customs territory',[4] and under its satellite treaty, the

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[1] For a discussion of the anomalous constitutional provisions of the Universal Postal Union see Sohn, loc. cit., *supra*; and a note on the International Trade Organization in this *Year Book*, 24 (1947), pp. 380–2.

[2] Art. 58 contains a colonial application clause: see p. 99, n. 2.

[3] World Meteorological Organization Convention of 1947, Art. 6 (*d*) and (*e*), and Art. 34; Havana Charter, Art. 71(1) (*b*) and (3).

[4] Defined for purposes of Chapter IV (Commercial Policy) of the Charter by Art. 42(2).

General Agreement on Tariffs and Trade,[1] there is no international organization established but the effect of the participation in the Agreement of overseas or dependent territories, which are separate customs territories, is precisely stated in Article XXIV(1): 'The rights and obligations arising under this Agreement shall be deemed to be in force between each and every territory which is a separate customs territory and in respect of which this Agreement has been accepted under Article XXVI or is being applied under the Protocol of Provisional Application.' The effect of this provision seems to be that each separate customs territory, whether it is itself a state or a dependent territory to which the General Agreement is extended under Article XXVI, is to be regarded as a separate party for the purposes of the interpretation and application of the Agreement.

It is of interest to consider certain intercolonial arrangements. These are not of course international agreements governed by international law or registrable under Article 102 of the United Nations Charter, but they show how an overseas territory may become a separate party to an administrative arrangement in fields in which it is self-governing. Such arrangements are made under the general authority of an Act of Parliament or are confirmed by Act of Parliament or Order in Council.[2] Thus, the Australian Colonies Duties Act, 1873, provided that:

> 'the legislature of any one of the Australian colonies shall, for the purpose of carrying into effect any agreement between any two or more of the said colonies, or between any one or more of the said colonies and New Zealand, have full power from time to time to make laws with respect to the remission or imposition of duties . . . provided that no duty shall be levied and remitted contrary to or at variance with any treaty or treaties for the time being subsisting between Her Majesty and any foreign power'.

Similarly, the British North America Acts, 1930 and 1949 respectively, confirmed, and gave the force of law to, Agreements between the Provinces and the Dominion Government relating to the disposal of waste lands, and to an Agreement between the Dominion Government and Newfoundland for its incorporation into Canada. Effect has also been given recently by Order in Council, under statutory authority, to a number of arrangements made between the Government of the United Kingdom itself and certain colonial Governments to afford relief from double taxation in relation to income-tax, excess profits, and the national defence contribution.[3] They are entitled 'arrangements', and the use of this term rather than 'agreement' shows that it has an administrative rather than a legal character; though made under the same statutory authority,[1] cast in almost the same form and designed for the same purposes as the double taxation agreements which have been concluded by the United Kingdom with Canada, South Africa, the U.S.A., and France, these arrangements are joint declarations of taxation policy rather than intergovernmental contracts.[2]

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[1] The Havana Charter is not yet in force; the *G.A.T.T.* is being applied provisionally by twenty-four countries.

[2] A colonial government has no authority, not expressly conferred by the Crown or by statute, to conclude any contract or agreement: *Jacques Cartier Bank* v. *Rex* (1895), 25 S.C.R. 84 (provincial secretary of Quebec signed a letter of credit not authorized by Order in Council; held by the Supreme Court of Canada that the letter did not constitute a contract).

[3] See, for example, *S.R. & O.*, 1947, No. 1779, Double Taxation Relief (Trinidad); No. 1773, Double Taxation Relief (British Guiana); No. 1774, Double Taxation Relief (Cyprus).

Another example of a joint arrangement between the colonies is that contemplated in the Colonial Naval Defence Acts, 1931–49, Section 1(2) of the latter providing that 'the legislature of a colony may provide for raising a force jointly with other colonies for their Naval defence within the territorial waters of all or any of them'.[3]

V. *Conclusions*

We may now attempt a summary of the conclusions of this article:

1. The overseas territories of the United Kingdom do not enjoy independent status in international law and therefore cannot enter into diplomatic relations with foreign states or participate as of right in treaties to which foreign states are parties.

2. Subject to certain limitations imposed by constitutional law and practice the greater number of overseas territories are self-governing in a number of administrative and technical fields.

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[1] Finance Act (No. 2), 1945, s. 51(1); it relates to 'arrangements . . . made with the Government of *any territory outside the United Kingdom*'.

[2] A recent Postal Services Agreement between the United Kingdom (on behalf of Mauritius) and the Portuguese colony of Mozambique has been registered with the United Nations under Art. 102 of the Charter and is printed in *United Nations Treaty Series*, vol. 5, p. 263.

This Agreement is entitled 'agreement between the Postal Administration of Mauritius and the Postal Administration of Mozambique for the Exchange of Parcels by Parcel Post' and it is signed by the Postmasters-General of the two colonies. Its general purpose is similar to the parcel-post regulations agreed between France and Mauritius in 1901 (*State Papers*, vol. 94, p. 50); here the agreement was made by 'a Crown Agent for the Colonies on behalf of Mauritius' in execution of Article IV of the Convention between Great Britain and France of 1900. The Agreement between Mauritius and Mozambique is listed in the *U.N. Treaty Series* as an Agreement between the United Kingdom of Great Britain and Northern Ireland (colony of Mauritius) and Portugal (colony of Mozambique). This title and the fact of the registration of the Agreement with the United Nations suggests that though in fact an administrative arrangement between two postal administrations, it is regarded as an international agreement between the United Kingdom and Portugal but there is no reference to this fact anywhere in the body of the Agreement; indeed, under Art. 35 the Postal Administrations themselves can terminate it. It is therefore doubtful whether it is an international agreement at all but rather an arrangement between two local administrations.

It may also be asked whether the Commonwealth Telegraphs Agreement concluded between the United Kingdom, Canada, Australia, New Zealand, South Africa, India, and Southern Rhodesia is to be regarded as an international agreement. While the inverse doctrine no longer applies as a matter of course to agreements concluded between the independent members of the Commonwealth the fact that the Governments concerned described themselves in this Agreement as 'the Partner Governments' suggests that they did not intend to make an international agreement between themselves. If this supposition is correct it is not easy to say what law applies to the agreement.

[3] Kenya, Uganda, and Tanganyika, which have a common legislature known as the East Africa Central Assembly, have agreed with Zanzibar for a combined Naval Force.

3. Separate participation in a treaty or international organization, concerned with one of these fields, is possible for an overseas territory provided that such separate participation (i) is assented to by the states parties to the treaty or members of the international organization concerned, and (ii) is effected diplomatically by the United Kingdom.

4. The function of the colonial application clause is to bridge the gap between the dependent status of the overseas territories in international law and their independence of the Government of the United Kingdom in certain administrative and technical fields under constitutional law and practice.[1]

5. The United Kingdom cannot accept treaties unless there is included in them a colonial application clause or it is clearly understood,[2] first, that its acceptance does not extend the treaty *ipso facto* to its overseas territories, and secondly, that the extension of the treaty to those overseas territories shall be accepted by the other states parties to the treaty at a later time, when, after consultation between the United Kingdom and those overseas territories, acceptance on their behalf proves necessary.

The colonial application clause has been a matter of intensive debate and sharp criticism in the United Nations, and the General Assembly at its Fourth Session decided against the inclusion of the clause in the Traffic in Women Convention. The criticism springs from two main lines of thinking: In the first instance, many members of the United Nations regard themselves as custodians of the principle of national self-determination; the Soviet Union and its supporters oppose the existence of colonies in any form, while China, India, Pakistan, and certain Latin-American countries, for obvious reasons to be found in their own histories, have vigorously asserted this principle in the United Nations. Secondly, there is a widespread feeling that treaties, especially those worked out and adopted by the United Nations with social and humanitarian objectives, should be universal in their application. Both avenues of approach converge against the colonial application clause because it appears to be a means by which colonial dependence is preserved and the social progress which may be achieved through international agreement hindered. The fact that the colonial application clause is not, even on the face of it, a method of *permanently* excluding overseas territories from the rights and obligations of a treaty to which the United Kingdom is to become a party, and the fact that the United Kingdom has extended numerous conventions to its overseas territories, weighs little with critics, who often attack the clause on political grounds remote from the true interests of the peoples for whom they express such concern.

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[1] The right of *separate* withdrawal of overseas territories from a treaty or international organization, which is often included in colonial application clauses, cannot, it seems, be entirely reconciled with these principles since it in effect gives the overseas territories a greater freedom of action than is permitted by a particular treaty to states parties to it.

[2] This understanding might be reached once and for all, perhaps in the General Assembly of the United Nations, in which case colonial application clauses would not be necessary at least in treaties concluded under the auspices of the United Nations.

The argument that the protection of human rights, the suppression of traffic in women, or the establishment of freedom of information in overseas territories cannot conceivably be denied and that they should be enforced as soon as possible in these territories above all is, at first sight, attractive, but it rests on misconceptions. It assumes that the United Kingdom will use the clause to delay or even prevent the application to its overseas territories of treaties seeking to make these principles effective, but the opposite is the case. As soon as consultation has taken place and the government of each territory has made its own decision to participate, the United Kingdom puts in train the process of accession on behalf of that territory. The overseas territories of the United Kingdom are participating widely in all manner of treaties and international organizations and the colonial application clause has proved in practice no obstacle.

THE TREATY-MAKING POWER OF THE UNITED NATIONS

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I. *The treaty-making power and international legal personality*

THE debate as to the existence of the international legal personality of the League of Nations did not, in general, involve much discussion of its capacity to make treaties. In the course of it, however, it was occasionally maintained, just as it was suggested independently,[1] that the League had a treaty-making power. Thus Sir John Fischer Williams deduced such a power, as evidence of the League's international personality, from the Council's approval of the intergovernmental agreements of 1922 for a 'League loan' to Austria. In his view there was no contract on behalf of the League as such until the Council by resolution undertook in the name of the League 'to accept the duties and liabilities which these Protocols involved'; thereafter, a contract under international law, binding on the League, existed.[2] Whilst, however, the rights to make war and peace, to send and receive diplomatic missions, to proceed to intervention, and other familiar capacities of states were frequently attributed or denied to the League by authors alleging or contesting its personality,[3] its capacity to make treaties was less frequently discussed in that context. This was probably due to the fact that the Covenant contained nothing contemplating *expressis verbis* the conclusion of treaties by the League. The power to conclude them had therefore to be deduced from general principle and from practice.

The case is otherwise with the United Nations, whose constituent instrument contains a number of stipulations capable of sustaining the interpretation that that organization can conclude treaties. It is not surprising, therefore, that they were relied upon by the International Court of Justice in support of its view[4] that the United Nations has a sufficient international personality to permit it to present a claim for damages in respect of injuries done to its servants in the course of their duties. The main purpose of this article is to survey these provisions as well as the practice of the United Nations 'of conclusion of conventions to which the Organization is a party'.[5]

The Court's reference to this practice, and its declaration that the Charter has provided 'for the conclusion of agreements between the Organization and its Members', were not made in a matter directly touching the capacity of the United Nations to make treaties. The treaty-making power was but one of the 'functions and rights . . . the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying . . . which can only be explained on the basis of the possession of a large measure of international personality and capacity to operate upon an international plane'.[1] Notwithstanding that the Court did not in fact examine in detail any other such function before coming to its general conclusion, that conclusion was of a general character:

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[1] Schücking u. Wehberg, *Die Satzung des Völkerbundes* (2nd ed. 1924), p. 117; Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926), p. 51.

[2] *International Law Association, 34th Report* (1926), pp. 675, 688, reprinted in *Chapters on Current International Law and the League of Nations* (1929), pp. 477, 493.

[3] See in particular Corbett in this *Year Book*, 5 (1924), pp. 119–98; and the literature referred to in Oppenheim, *International Law*, vol. i (7th ed. 1948), p. 344, n. 3 and p. 345, nn. 1–5.

[4] *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports*, 1949, p. 174.

[5] Ibid., p. 179.

> '. . . the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, and that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.'[1]

Thus, largely—or exclusively—on the basis of the attribution to it of a treaty-making power, the long controversy as to the international legal personality of the general international organization has received an authoritative solution. Yet it may still be necessary to distinguish clearly between the capacity of the organization to make treaties and its more general capacities, or perhaps the sum of its capacities, which may be described by the phrase 'international personality'. It may well be that, in a given case, each implies the other. However, the 'personality concept' of a legal entity obscures as much as it explains.[2] It has been rightly suggested that there is a distinction between the 'administrator' of a right and the subject of a right, and that the fact that a single entity—as the adult human being in most systems of municipal law—may at one and the same time be both is purely fortuitous.[3] All this is perhaps implied in the passage from the Court's Opinion which has been cited. For what in effect the Court did was to deduce from the limited quality of the United Nations as administrator,[4] and from its more general quality as subject,[5] of international contractual rights, its capacity to be a subject of primary rights *ex delicto*,[6] and even to possess certain remedial rights.[7] Yet the Court would presumably deny the capacity of the United Nations to claim the principal international remedial right now existing—that of appearing as a party before the Court itself. In fact, in view of the wording of Article 34 of its Statute, no other alternative would seem to be open to it. Its somewhat obscurely worded argument[1] from the General Convention on the Privileges and Immunities of the United Nations, which is to the effect that the United Nations is the subject of rights under that instrument, if indeed it can be taken to imply that the Organization was a party to the Convention, will sustain that implication only on the basis of a provision in the Charter[2] specifically contemplating the making of that Convention. It does not show conclusively that the United Nations can contract by treaty generally.

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[1] *I.C.J. Reports*, 1949, at p. 179.

[2] See in particular Nekam, *The Personality Concept of the Legal Entity* (1938), esp. pp. 116–24.

[3] See Nekam, op. cit., p. 29.

[4] See the phrase 'The Charter has . . . provid[ed] for the conclusion of agreements between the Organization and its Members . . .' already cited.

[5] See the phrase: 'The [General] Convention . . . creates rights and duties between each of the signatories and the Organization' (*I.C.J. Reports*, 1949, p. 179).

[6] See the phrase '[the Organization] has capacity to maintain its rights', already cited.

[7] For the distinction between remedial and primary rights, see Beale, *A Treatise on the Conflict of Laws* (1935), § 163.

Moreover, not only in general but also in so far as it may be taken to relate to the treaty-making power of the United Nations, the Opinion of the Court is hedged about with saving clauses. That the United Nations has been held to be an 'international person' is not, therefore, to be taken as meaning that it has capacity to conclude every type of treaty or, indeed, any treaty at all. It could be no less an 'international person'—in the sense of a subject of rights—even if it were debarred from ever being a party to the conclusion of a treaty. Its treaty-making power is to be deduced, if at all, not from the mere fact of its 'personality', but from evidence pointing to its having that sort of personality which involves capacity to make treaties.

However, the temptation to make the sweeping deduction of the kind propounded by the Court is natural in the circumstances. It is indeed an inherent danger of the 'personality concept' that it invites the attribution of uniform qualities to all persons. Thus, in municipal law, the adult human being tends to be looked upon as the 'natural' person. There is a tendency to deny personality to other legal entities if they do not possess the principal legal characteristics of adult human beings, or alternatively, to credit them with these characteristics for no other reason than that they have been labelled 'persons'.[3] Anthropomorphism of this sort has not, indeed, complicated the concept of personality in international law however much it may have influenced, for instance, the rules as to territorial sovereignty. Nevertheless, international law, like municipal law, has its typical—one might almost say its 'natural'—person, the State.[4] The question of the existence or non-existence of the personality of international organizations has been approached by reference to the common attributes of states, such as the right of legation, the capacity to exercise territorial sovereignty, &c.[1] Even where the opinion has been advanced that such organizations may be credited with personality, they have been described as persons *sui generis*.[2] Some have regretted that solution on account of the breach of the uniformity of the personality concept which it involves.[3] This must seem today a curiously unconstructive attitude towards the matter. That the general international organization should be a person *sui generis* is surely no more shocking than that the Crown in English law should be a person *sui generis*. However, the debate as to the personality of the principal international organization was influenced by a calculation as to the interests of the typical legal person—the State. The declaration of the International Court of Justice that the United Nations, though a person, is not a super-state,[4] is an interesting legacy of this phenomenon. Its necessity is not, however, apparent unless it is still thought that there is magic in the term 'person', and that capacities are attributable to an entity designated as 'person' by reason of that designation alone.

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[1] 'That Convention creates rights and duties *as between each of the signatories and the Organization* (see, in particular, Section 35). It is difficult to see how such a convention could operate except upon the international plane and *as between parties possessing international personality*' (*I.C.J. Reports*, 1949, p. 179—italics supplied).

[2] Art. 105 (3); see further p. 128 *infra*.

[3] Nekam, op. cit., p. 117.

[4] 'International law is itself a system of the legal relations not of natural persons but of persons aggregate—*personnes morales*' (Fischer Williams, op. cit., p. 692).

II. *The general nature of the treaty-making power of international organizations*

Even if we avoid the error of holding that, because an international organization is an international 'person', it may therefore make treaties, it is still necessary to steer clear of the equally misleading assumption that this power is identical, in either extent or essence, with the treaty-making power of states. The term 'treaty' is as elastic as 'jurisprudence'. In the Harvard Draft Convention on the Law of Treaties the term is indeed limited to mean 'a formal instrument of agreement by which two or more States establish or seek to establish a relation under international law between themselves'.[5] This would seem unduly restrictive in that it does not include 'an agreement effected by exchange of notes'.[6] It is a limitation which it is a little hard to justify but which apparently follows from the fact that the definition quoted is both formal and material and includes a *projet* of a treaty as well as a treaty in force;[7] and a *projet* of an exchange of notes is difficult to conceive. But a more serious limitation from the point of view of the present inquiry is the assertion that states only are capable of concluding a treaty.[1] That view is clearly unacceptable. It might, therefore, be desirable to amend the definition so as to include within the term treaty any 'formal agreement by which two or more States [or international organizations composed wholly or mainly of States, or organs thereof] establish or seek to establish a relation under international law'.

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[1] See p. 108 *supra*.

[2] Oppenheim in *Revue Générale de droit international public*, 26 (1919), pp. 234, 238.

[3] 'Is the League of Nations a person in international law? If so, must we, like Oppenheim, despair of bringing it within the existing category or categories of international persons and accept the surrender of his *sui generis*?' (Corbett, loc. cit., p. 119).

[4] Cited p. 109 *supra*. See also the *Written Statement of the Government of the United Kingdom* and the *Statement by M. Kaeckenbeeck* (Belgium), International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations, Pleadings, Oral Arguments, Documents*, 1949, pp. 23, 29, 94, and 96.

[5] *Research in International Law under the Auspices of the Faculty of the Harvard Law School, Draft Convention on the Law of Treaties with Comment*, in *American Journal of International Law*, 29 (1935), Suppl., p. 686: Art. 1 (*a*).

[6] Ibid., Art. 1 (*b*), loc. cit., p. 698.

[7] Ibid., Art. 1 (*a*), Comment, loc. cit., p. 692.

Yet it may be doubted whether the definition, even when amended in this way, is sufficiently informative or wide. The Comment to the words 'or seek to establish' in the Harvard Draft is here of significance. It is pointed out there that 'It is conceivable that a treaty might define or establish relationships between the parties without necessarily creating rights or obligations for the parties'. This fact is adduced as an additional reason for including the words 'or seek to establish' on the ground that the resulting definition 'is sufficiently broad to embrace both sorts of agreements: those which establish rights and/or obligations and those which establish relations without creating rights or obligations'.[2] This claim is a little obscure, but presumably what is meant is that a treaty is a bi- or multipartite act in the law of a contractual nature and commonly creates specific rights or obligations for at least one party. But it may not do so—for instance, if it merely codifies the customary law of nations,[3] or if it merely recites that one government recognizes another and will in consequence observe the general rules of international law *vis-à-vis* that other,[4] or if its terms constitute a mere declaration of policy or are otherwise otiose.[5] Whether this latter class of so-called treaties can properly be described as seeking to establish a relationship under international law (i.e. seeking to create rights and duties under that law)[6] seems to be doubtful.[7] However that may be, it is to be observed that the quality as independent acts in the law of various of the agreements which have been or may be concluded by international organizations is arguable.[8] Their designation as 'treaties' may therefore be open to objection unless a suitably wide definition of a

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[1] *Harvard Draft Convention on the Law of Treaties*, Art. 1 (*c*), loc. cit., p. 698.

[2] Ibid., p. 692.

[3] See, however, Jennings, in this *Year Book*, 24 (1947), p. 305, as to the legal nature of 'codification' treaties which go beyond mere 'restatement'.

[4] Cf. the Agreement between Switzerland and the United Nations whereby the former recognizes the personality 'according to international law' of the latter, discussed p. 146 *infra*.

[5] The Atlantic Charter might be held to fall into this category (see Mervyn Jones in this *Year Book*, 21 (1944), pp. 111, 121); or the Universal Declaration of Human Rights (see Lauterpacht in this *Year Book*, 25 (1948), pp. 354–76); or the Draft Declaration on the Rights and Duties of States (see pp. 516–19 of this volume of the *Year Book*). For a good example of an otiose reservation to a treaty see the Comment to the *Harvard Draft Convention*, loc. cit., p. 861.

[6] See the *Harvard Draft Convention*, loc. cit., p. 692.

[7] A *projet* of a treaty, which is also intended to be covered by the expression (see the *Harvard Draft Convention*, loc. cit., pp. 692–3), is more logically capable of being so described.

[8] See further, pp. 119, 121, 124–6 *infra*.

'treaty' is adopted.[1] Nevertheless, it would not appear to be any more objectionable than the classification as 'treaties' of the second category of inter-state agreements embraced by the Harvard Draft.

What is even more doubtful is the status of agreements in relation to which international organizations, or their organs, may or must play a certain role. This is more than a merely executive function but it is difficult to describe it as constituting participation in the 'conclusion' or making of such agreements. May these be properly described as treaties 'of' the organizations concerned? For instance, is the United Nations a 'contracting party' to the so-called trusteeship agreements which, under the Charter,[2] require to be 'approved' by the General Assembly or, as the case may be, by the Security Council? Or does the taking of that view tend

> 'to obliterate the distinction made by the Charter between the two stages in the setting up of a trusteeship, namely, the first stage of negotiation by the states concerned and a second stage in which the terms negotiated and agreed upon are approved by the General Assembly or the Security Council'?[3]

In any event the function of the General Assembly of 'approving' trusteeship agreements seems different from its practice of 'adopting' or 'approving' such instruments as the Convention on the Prevention and Punishment of Genocide, where approval or adoption amounts to no more than a recommendation of a draft for acceptance as binding by individual states.[4] Moreover, having regard to the view expressed by the International Court of Justice,[5] it may be that the General Assembly's 'approval' of the General Convention on the Privileges and Immunities of the United Nations constitutes an act within yet another category.[6]

A general international organization has, by definition, a variety of functions to perform. In so far as concerns treaties, these may include not only the conclusion of treaties in the capacity of a contracting party, but also the elaboration of projects of treaties to be accepted as binding as between the states members *inter se*. This latter function of quasi-legislative drafting is one of great importance which bids fair to replace the negotiation of multipartite instruments by *ad hoc* conferences of representatives of states.[7]

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[1] See further, pp. 119, 126 and 129 *infra*.

[2] Arts. 83, 85.

[3] Schachter in this *Year Book*, 25 (1948), p. 130; see further p. 122 *infra*.

[4] See, for example, Resolutions of the General Assembly, Nos. 179 (II), *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, pp. 112; 255 (III), 256 (III), 260 (III) A, *United Nations, Official Records of the Third Session of the General Assembly, Part I, Resolutions*, pp. 164, 171, 174.

[5] See p. 110 *supra* and p. 142 *infra*.

[6] As to 'approval' by the General Assembly of agreements with specialized agencies concluded under Art. 63 of the Charter, see p. 139 *infra*.

[7] The first example of the drafting of a treaty under the auspices of an organ of an international organization appears to be the Statute of the Permanent Court of International Justice, which was elaborated by an Advisory Committee of Jurists appointed by the League Council in pursuance of its duty under Art. 14 of the Covenant, to 'formulate and submit to the Members of

Again, it may be the function of an organ of an international organization to confirm or cancel the bargains of its Members *inter se*. Possibly the functions of the General Assembly with respect to trusteeship agreements may have been conceived in this sense.[1] But the trusteeship system is perhaps not the only context in which the principal organs of the United Nations appear to have a function of this kind. Chapter VIII of the Charter (Regional Arrangements) provides a possible further example, albeit an indefinite one, of entrusting the United Nations with a supervisory power over the treaty relations of Members.[2]

At the same time the principal repository of power within an international organization is invariably an organ made up of representatives of states rather than an autonomous body or an individual officer.[3] Such an organ can only, it would appear, act by means of resolutions,[4] just as a legislature, as distinct from its constituent parts, can only act by means of enactments. It must perform all its functions, which may be very various, by this single means. The conclusion, *qua* contracting party, of a treaty by such an organ in behalf of the organization of which it is part, the proposal of a draft treaty for conclusion by Members *inter se*, and the confirmation of a treaty concluded by Members *inter se*, will thus all bear a superficial resemblance to each other and will indeed, in so far as the constitutional law of the organization is concerned, possess an identical legal quality. But if the will of an international organization to consent to be bound by a treaty can only be formed or formulated by means of a resolution of the appropriate organ, it does not follow that the relevant consent must be signified by that means. Thus the chief or some other executive officer of the organization may be entrusted with its treaty-making power for a particular purpose.[5] In relation to the acts of such an officer, it would appear to be doubtful if it could

> 'properly be asserted, as it has been with reference to interstate agreements, that the Director-General or Secretary-General had "apparent authority" to conclude the agreement and that the organization was accordingly bound by his act, though the constitution might require ratification or approval by one of the other organs'.[6]

The same indeed applies to the formation of the will to be bound by a treaty by a representative organ of an international organization. Such an

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the League for adoption plans for the establishment of' the Court. The resulting draft was submitted to the Assembly rather than to the individual Members of the League and a Protocol of Signature was opened by the Secretary-General: see, for example, Fachiri, *The Permanent Court of International Justice* (2nd ed. 1932), pp. 9–11. As to examples from the practice of the United Nations see the references given on p. 113, n. 4 *supra*.

[1] See pp. 122–8 *infra*.

[2] See Art. 52 (3) of the Charter.

[3] For an analysis of some alternatives see Jenks in this *Year Book*, 22 (1945), pp. 11, 42–4.

[4] '[T]he term "resolution" is applied to all determinations of the General Assembly . . .' (Sloan in this *Year Book*, 25 (1948), p. 1).

[5] See pp. 140–2 *infra*.

[6] Jessup, *A Modern Law of Nations* (1948), p. 130.

organization does not necessarily have a single, supreme organ. Thus both Council and Assembly could deal 'with any matter within the sphere of action of the League or affecting the peace of the world'.[1] That provision implied that each of the organs mentioned could bind the other or, what is perhaps the same thing, the whole League. The situation is materially different within the United Nations, where the General Assembly and the Security Council, though possibly both supreme, are organs with competences which are often mutually exclusive.[2] Further, though the appropriate organ or organs of an international organization may be supreme within the sphere of that organization, they are sovereign only within that sphere and not within the wider sphere of general international law. Such an organization is essentially but a *traité organisé*, a living treaty, the creature of the joint wills of the states which are parties to its constitution. If, therefore, there be any agreement as to the binding force of a treaty purporting to be concluded on behalf of a state otherwise than in conformity with its constitution,[3] the rule accepted or contended for cannot be extended to international organizations. Their competence is, as it were by definition, essentially limited, and no doctrine of implied warranty of authority applicable in relation to states can be exactly applied in relation to them.

On the other hand, there may be attributed to international organizations powers and functions not expressly contemplated in their constitutions. Thus, as has been seen,[4] the Covenant made no mention of a treaty-making power. In practice the League did conclude treaties. Indeed, as respects the treaty-making power, the implied authority of international organizations is perhaps greater, and of greater significance, than their express authority. Such implied authority must of course be limited to the 'sphere' of the organization concerned—to the range of the spirit, if not of the letter, of its constitution. But that range may be very wide. Thus, under Article 13 (1) of the Charter, the General Assembly of the United Nations —which is a mere organ of the Organization—is empowered to 'initiate studies and make recommendations for the purpose of . . . promoting international cooperation in the political field and . . . promoting international cooperation in the economic, social, cultural, educational, and health fields and assisting in the realization of human rights and fundamental freedoms for all. . . .' It may be that the initiative here given is circumscribed by paragraph (2) of the same article which recites that 'the further responsibilities, functions, and powers of the General Assembly with respect to [international cooperation outside the political sphere] are set forth in Chapters IX and X'. For it can be contended, for instance, that the 'initiation of studies' and the 'making of recommendations' could not properly include the making of treaties. This construction is perhaps borne out by the wording of Article 59 which provides that 'The Organization shall, where appropriate, initiate negotiations *among the States concerned*[1] for the creation of any new specialised agencies for the accomplishment of the purposes set forth. . . .' But it would be difficult to deny that the United Nations could, by means of the conclusion of a series of bipartite treaties between itself and individual states, inaugurate a movement for the protection of human rights somewhat similar to the anti-slavery campaign fought by treaty by the United Kingdom during the last century.

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[1] Covenant of the League, Arts. 3 (3), 4 (4).

[2] See the Charter, Arts. 10–12, 24 (1). See also pp. 123–4 *infra*.

[3] See the Comment to Art. 21 of the *Harvard Draft Convention on the Law of Treaties*, loc. cit., pp. 993–5, 1008–9.

[4] See p. 108 *supra*.

There arises, too, in relation to international organizations, another complication of the treaty-making function which derives from their constitutional nature. This is the question of their capacity to contract by any means other than a treaty, a matter which is especially acute with regard to their relations *inter se*. Even in relations exclusively between states it has been remarked that the treaty is a 'sadly overworked instrument'.[2] But the capacity of states to contract with each other otherwise than by treaty is not in any doubt, nor is it subject to any limitation *ratione personae*. If one state is disposed to contract with another by reference to its own or to another system of municipal law, there is nothing to prevent this.[3] A transaction between two governments relating to, for instance, the sale of a warship, may thus be effected either by treaty or by contract.[4] And since every state recognizes the juridical personality,[5] according to its own system of municipal law, of every other state with which it entertains relations,[6] no obstacle to the enforcement of inter-state contracts exists except the procedural impediment of immunity from suit.[7]

In the case of international organizations, however, there are greater difficulties. Their very capacity to contract by reference to any system of municipal law is in dispute.[8] Though it has become usual to make provision for the matter in the constitutions of such organizations,[1] the provision made is not always wholly satisfactory.[2] Moreover, it would seem that the transactions of international organizations *inter se* must always be by treaty. Thus an arrangement between the United Nations and the World Health Organization concerning, say, the supply of stationery, is a treaty and can be made, apparently, by no other means than by treaty.[3] The resulting situation, which may in the future loom conspicuously in the Treaty Series,[4] is a strange one. But it is a logical consequence of the circumstance that transactions between international organizations are ordinarily referable to no system of municipal law and must, therefore, be referable to international law. There are not at present many precise rules of international law governing such transactions. There is no reason why they should not be developed.

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[1] Italics supplied. See further p. 122 *infra*.

[2] McNair in this *Year Book*, 11 (1930), p. 101.

[3] See the decisions collected by Mann in this *Year Book*, 21 (1944), pp. 11–23, and Fawcett in ibid. 25 (1948), pp. 34–51.

[4] See the writers referred to in the preceding note, and see also Anzilotti, *Cours de droit international* (transl. Gidel) (1926), vol. i, p. 342.

[5] Cf. Lauterpacht, *Recognition in International Law* (1947), esp. pp. 44, 145–53.

[6] As to unrecognized states, see the reference given in the preceding note. Enemy states would appear to suffer a mere procedural disability. See as to this case, and as to that of a rupture of diplomatic relations, *Research in International Law under the Auspices of the Faculty of the Harvard Law School, Draft Convention and Comment on Competence of Courts in regard to Foreign States, American Journal of International Law*, 26 (1932), Suppl., pp. 455, 503–5. See also Borchard in *Yale L.J.*, 31 (1922), pp. 534–7; and Fraenkel in *Columbia L.J.*, 25 (1925), pp. 544–70.

[7] Though it may be suspected that the immunity of a state in its own courts and the immunity of foreign states are not unconnected historically. Where the former is abrogated, as has often been the case in recent years, there is less objection to one state suing another, or at least an organ of another, in the latter's courts. Cf. the interesting case of *Monaco* v. *Mississippi* (1934), 292 U.S. 313.

[8] See the exhaustive bibliography assembled by Jenks in this *Year Book*, 22 (1945), p. 267, n. 1.

Whether the rules applicable to inter-organizational treaties are—or will be—the same as those applicable to inter-state treaties is doubtful. In so far as concerns the question of implied warranty of authority of a treaty-making agent, and of the external effects of internal or constitutional limitations upon the treaty-making power, it has already been suggested that there must be a difference. There may be other differences.

It would, accordingly, appear appropriate to approach the question of the treaty-making power of international organizations in general, and of the United Nations in particular, without adopting too narrow a definition of a 'treaty', or of what constitutes the 'making' of a treaty. The spectacle of an international organization making a treaty is almost as new as that of its presenting an international claim. New rules must, where necessary, be devised to meet either case. Neither is it certain that express attribution of the treaty-making power is essential. Thus an agreement regarding the mutual relations of two international organizations might more elegantly be achieved by means of a treaty entered into between the individual states members of the two organizations rather than between the latter bodies. It may be observed that this mode of proceeding was adopted when the International Telegraph Union was merged into the International Telecommunications Union[5] or when the functions of the International Office of Public Health were transferred to the World Health Organization.[6]

However, the wind is already blowing steadily in the direction of what may be called centralization in this aspect of international life. The important, and the constructive, task is to control adequately its force and direction. In particular, the appropriate development of the capacities of the United Nations must not be allowed to be hindered or warped by the drawing of hampering analogies from the capacities of states or by any confusion between the two. There is a distinct tendency to confuse the individual will and function of the state, member of an organization, with the group will and function of such an organization or its organs. Of that tendency there are numerous examples in connexion with the acceptance of reservations proposed by states seeking to become parties to treaties. Thus when, in offering to accept the Constitution of the World Health Organization,[1] the United States sought to attach to its acceptance a reservation of its right of withdrawal from the Organization upon the giving of a year's notice, the plenary organ of the Organization purported to 'accept' this reservation.[2] In the event, the depositary of the Constitution found itself able to regard this step as one of mere interpretation of that instrument, which is within the power of the organ concerned.[3] But the incident was in reality an instance of an unconscious usurpation by representatives of states, met within an organ of an international organization and accredited only for the conduct of the business of the organization as delimited by its constitution, of functions belonging exclusively to states individually.[4]

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[1] Cf. p. 146 *infra.*

[2] See Jenks in this *Year Book*, 22 (1945), pp. 267–75.

[3] As to the impossibility, with respect to inter-state relations, of drawing any distinction *ratione materiae* between treaties and contracts see Mann, loc. cit., see also Fawcett, loc. cit.

[4] Compare the list of such treaties at p. 137 *infra.*

[5] See the Telecommunications Convention of Madrid, 1932: Hudson, *International Legislation*, vol. vi, p. 111.

[6] See the Protocol Concerning the Office International d'Hygiène Publique, signed at New York on 22 July 1946 (*United Nations Treaty Series*, vol. ix, p. 66). See also this *Year Book*, 24 (1947), pp. 448–9.

III. *The provisions of the charter respecting the treaty-making power of the United Nations*

There are four principal provisions, or groups of provisions, in the Charter of the United Nations from which the capacity of that organization to enter into treaties may be derived. In addition, there are various provisions of the Charter mentioning or contemplating treaties which require to be considered in the present context if only for the sake of contrast. It is proposed to deal with all these provisions *seriatim*.

1. *Article 43. Agreements with the Security Council in the Matter of the Enforcement of the Charter.*

Article 43 of the Charter provides that:

> '1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

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[1] *United Nations Treaty Series*, vol. xiv, p. 185: this *Year Book*, 24 (1947), p. 451.

[2] See *United Nations Treaty Series*, vol. xvi, p. 364, note.

[3] See Art. 75 of the Constitution.

[4] For other examples of the same tendency see *American Journal of International Law*, 44 (1949), pp. 123–8.

'2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

'3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.'

This provision appears to endow the United Nations, or at least the Security Council thereof, with capacity to make a particular type of treaty. Whether the capacity thus conferred is exclusively that of the Security Council either as a quasi-person or as a number of states in their collective capacity, or of the latter as agent for or on behalf of the United Nations as a whole is to some extent an open question. It can thus be argued from Article 24 (1) of the Charter, whereby the Members of the United Nations confer on the Security Council 'primary responsibility for the maintenance of international peace and security', that the latter is the case. This construction is supported by the circumstance that the agreements envisaged in Article 43 are provided for 'in order to contribute to the maintenance of international peace and security'. However, the fact that Article 24 (1) continues: '[the Members] agree that in carrying out its duties under this responsibility the Security Council acts on their behalf', could be taken to point to the fact that the Security Council's primary responsibility for the maintenance of peace and security is delegated to it by the individual states Members of the United Nations rather than by the latter *qua* organization, and that its treaty-making power is a consequence similarly derived and enjoyed.[1]

The various objections which could be made to the classification of the 'agreements' contemplated by Article 43 as treaties[2] are equally immaterial in view of the broad definition of treaties which is adopted here. Some of these objections are, however, intrinsically interesting. It could be said, for instance, that the agreements in question, if they existed at all,[3] would not be independent acts in the law but would merely supply the details of obligations already imposed in general terms by the Charter. Their proposed subject-matter is certainly no more than 'the number and type of forces, their degree of readiness and general location, and the nature of the facilities and assistance' to be furnished to the Security Council. On any construction these are mere details, essentially subordinate to the general obligation—if there be an obligation—of contributing to the maintenance of peace and security which paragraph (1) of the article imposes. They are matters essentially incapable of statement *in extenso* in a document such as the Charter. They may, further, be incapable of stipulation in an independent treaty. As between states—for instance in accordance with the Franco-British *entente*—they have commonly been regulated in conversations of or time-tables drawn up by general staffs, rather than in treaties of alliance, of which they are merely executory. The process of making them precise can be looked upon as a process of fulfilment of the principal agreement. It is not even a process of supplementing or amending that agreement, in which case it would have of course to be regarded as involving a distinct act in the law.[1] In the words of the Advisory Committee of Jurists which in 1921 recommended to the General Assembly of the League that Article 18 of the Covenant should not be interpreted so as to impose an obligation to register, amongst others, agreements on matters of this sort:

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[1] This seems to be the view of Goodrich and Hambro, *The Charter of the United Nations, Commentary and Documents* (2nd ed. 1949), p. 287.

[2] Mr. John Foster Dulles stated to the United States Senate Foreign Relations Committee his view that the term 'agreements' in Art. 43 was, for the purposes of the United States Constitution, synonymous with the term 'treaty' (see Goodrich and Hambro, op. cit., p. 287, n. 99). This is of course not a question of international law.

[3] See p. 131 *infra*.

> '[They] consist merely of technical regulations defining, without in any way modifying, [another] instrument . . ., or . . . are only designed to enable such an instrument to be carried into effect.'[2]

Similarly, notwithstanding the fact that an agreement amending or supplementing a treaty is itself a treaty and thus a distinct act in the law, Article 43 is capable of being regarded as a mere 'agreement to agree'. For it may be asked whether a Member of the United Nations has any obligation to assist the Security Council by military action[3] if it has concluded no 'special agreement' to that end, and also, what is not quite the same thing, whether such a Member is under any legal obligation to conclude such a special agreement. The first question turns largely upon the interpretation of Article 42 whereby the Security Council is empowered, if economic and like measures under Article 41 prove ineffective to give effect to its decisions, to take 'action by air, sea, or land forces' for the maintenance of peace and security. It is specifically stated that 'such action may include demonstrations, blockade, and other operations by air, sea, or land forces *of Members of the United Nations*'. Committee III/3 of the San Francisco Conference adopted an interpretative resolution to the effect that Article 42 imposed no obligation to contribute forces and facilities in excess of those stipulated in the special agreements which Article 43 contemplates.[4] Commentators on this resolution regard it as 'appearing to warrant the further conclusion that until a Member has concluded a special agreement with the Security Council, it is under no obligation to take military action under Article 42'.[5]

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[1] Cf. McNair, *Law of Treaties* (1938), p. 155.

[2] *League of Nations Documents*, 2nd Assembly, Plenary, p. 702.

[3] The obligation of Art. 41, respecting non-military assistance to the Security Council, is clearly absolute.

[4] *U.N.C.I.O. Documents*, vol. xii, p. 508.

[5] Goodrich and Hambro, op. cit., pp. 280, 530.

This interpretation is borne out by the wording of Article 106[1] though it is incompatible with the presumed intent of Articles 25 and 39, and even of Article 42 itself. It does not, however, necessarily support any view that there is no obligation upon Members to enter into appropriate 'special agreements'.

2. *Articles 57 and 63. Agreements of the Economic and Social Council*

Article 63 (1) of the Charter provides that:

> 'The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57 [i.e. the various specialised agencies, established by intergovernmental agreement, and having wide responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields] defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.'

This provision, in contrast with Article 43, leaves no doubt that the power to conclude agreements which it confers is not exclusively that of the Council concerned. It is likewise clear that Article 63 cannot have been in the mind of the International Court of Justice when that tribunal referred to the Charter as authorizing the conclusion of agreements between the Organization and its Members.[2] For to regard agreements under this article as made with individual states, though it might support the thesis that the United Nations has personality, would involve the denial of personality to the specialized agencies. Moreover, the stipulation in Article 57 to the effect that the specialized agencies shall be 'brought into relationship' with the United Nations is, when taken together with Article 63, to some extent susceptible of interpretation as a mere 'agreement to agree'. On the other hand, the circumstance that agreements are to be made under the latter article merely for the purpose of 'defining the terms' on which relationships 'shall' be established can be used as an argument for not regarding such agreements as legal acts distinct from the Charter. Also, Article 63 envisages agreements of a necessarily different type from the generality of inter-state treaties. They are more in the nature of working agreements between different organs of government within a single state than of contracts between individuals. The familiar private law analogy of the contract is scarcely applicable to them. Yet, strangely enough, they may be the least 'international' of all treaties since they may be considered treaties at all chiefly because they are referable to no law other than international law. But the latter system, which has only just admitted the personality of international organizations, contains as yet no precise rules as to their interrelation. Hitherto that problem has been evaded, as has been seen, by its treatment in agreements to which not the organizations themselves, but their individual state members, are parties.[1]

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[1] Cf. the phrase 'Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, . . .'.

[2] *Supra*, p. 109.

Article 63 is not to be construed as conferring upon the competent organs of the United Nations an unlimited treaty-making power *vis-à-vis* other international organizations. For, in the first place, it contemplates agreements only for the purpose of the *bringing into relationship with the United Nations* of such other organizations. The endowment of a lesser organization with a new responsibility, not already defined in its 'basic instrument', may indeed be a matter within the province of the United Nations. But the *sedes materiae* is not in Articles 57 and 63 but rather in Article 58, whereby it is required to 'make recommendations for the co-ordination of the policies and activities of the specialised agencies'.[2] Secondly, Articles 57 and 63 speak only of 'specialised agencies'. The text recommended by Committee II/3 of the San Francisco conference referred to 'specialised intergovernmental organisations and agencies having wide international responsibilities in economic, social etc. fields' and indicated that this expression was not intended to embrace the totality of international organizations. The Committee, however, added that it was not intended to preclude the Economic and Social Council from entering into agreements, in its discretion, in order to bring 'other types of intergovernmental agencies', besides specialized agencies, into relationship with the United Nations.[3] If this power in fact exists, it would not seem that it can be derived from Articles 57 and 63.[4]

3. *Chapter XII. The Trusteeship System*

The question of the status of the so-called trusteeship agreements has been already anticipated to some extent. The actual provisions of the Charter respecting these agreements are somewhat diffuse and obscure. They are contained in Chapter XII which bears the cross-title of 'International Trusteeship System' and which refers throughout to a [trusteeship] 'system'. It is provided in Article 77 (1) that this 'system' shall apply to each of three categories of territories—mandated territories, territories to be detached from enemy states, and territories voluntarily placed under the system—'as may be placed thereunder by means of trusteeship agreements'. This constitutes the first mention in the Charter of 'trusteeship agreements' as such. The contractual basis of the system is further seemingly emphasized by the provision in Article 77 (2) that 'it will be a matter for subsequent *agreement* as to which territories [of the categories laid down] will be brought under the trusteeship system and upon what terms'. Article 79 then provides that 'the *terms* of trusteeship' for each territory to be placed under the system 'shall be *agreed upon* by the states directly concerned, *including* the mandatory power in the case of territories held under mandate. . . .'[1] There follow two articles referring again to 'trusteeship agreements':

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[1] See p. 117 *supra*.

[2] Cf. also the power of the United Nations, under Art. 59, to initiate negotiations among the states concerned for the creation of new specialized agencies, referred to p. 116 *supra* and p. 130 *infra*.

[3] See further p. 132 *infra*.

[4] *U.N.C.I.O. Documents*, vol. x, pp. 272, 281.

> 'Article 80. 1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.
>
> '2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.'

This provision is interesting in so far as the use of the term 'agreement' in the reference back to Article 79 would seem to discount the significance of the difference, if any, between an 'agreement' and the 'terms' to be 'agreed upon' of which the latter speaks. Paragraph (1) of Article 80 would also seem to indicate fairly definitely that the 'agreements' it envisages are of the nature of treaties. Paragraph (2), though obscure in view of the emphasis laid in Article 77 on the voluntary nature of the trusteeship system, has no contrary implication.

> 'Article 81. The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.'

This article raises the question as to whether or not the agreement of 'terms' referred to in Article 77 is not a process distinct from that of the conclusion of a 'trusteeship agreement', which must 'include' such terms. It gives superficial—but, it is believed, no more than superficial—support to the thesis that a non-member of the United Nations may be made an administering authority of a trust territory. In contemplating the possibility of the United Nations being an administering authority, it raises an aspect of the question as to the extent to which that Organization is or may be a contracting party to a trust agreement wholly distinct from any about to be discussed.

Articles 82 and 83 speak also of 'trusteeship agreements'—the former relating to the designation in any such agreement of a strategic area, and the latter to the substitution, in regard to strategic areas so designated, of the Security Council for the General Assembly in the exercise of 'all functions of the United Nations . . . including the approval of the terms of the trusteeship agreements and of their alteration or amendment'. Finally, it provided in Article 85 that:

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[1] Italics supplied.

> '1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.
>
> '2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.'

If these provisions were designed to establish a system the legal basis of which was to be a series of agreements to which the contracting parties were to be, on the one hand, the United Nations itself, and, on the other, the administering authority of each trust territory, and perhaps also the internationally responsible entity whose administration was to be replaced, if not the continuing local administration, they could scarcely be more obscurely worded. But it is a well-known fact that the drafting of Chapters XI, XII, and XIII was less precise and less considered than that of the rest of the Charter. The explanation of this fact—an explanation which does not, however, exactly go to establish what may be called the theory of the 'treaty basis' of the trusteeship system—was that, as the Dumbarton Oaks proposals contained nothing on the subject of 'non-self-governing territories', the chapters in question stem from a subsequent and wholly distinct source. That source was the United States working paper which had been 'prepared with careful study and consultation on the general foundation of the various proposals advanced . . .' and which was adopted as a basis of discussion by Committee II/4 of the San Francisco Conference, the body responsible for elaborating them.[1] There is thus no unity of drafting between Chapters XI to XIII and the rest of the Charter. One instance of this is the use, throughout Chapters XII and XIII, of the neutral term 'state' to designate both Members of the United Nations alone and states generally. This usage is in distinct contrast to the careful differentiation achieved elsewhere and results from the derivation of Part B (Territorial Trusteeship System) of the working paper from an earlier United States draft,[2] to all intents and purposes here relevant, identical with parallel Chinese, French, and Soviet Russian drafts which all spoke loosely of 'States' when referring to administering authorities.[3] Despite this impreciseness of language, all these drafts envisaged a Trusteeship Council containing representatives of, *inter alios*, each of the administering 'States'. They all envisaged also the application of the trusteeship system to territories to be detached from the enemy at the end of the then war.

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[1] *U.N.C.I.O. Documents*, vol. x, p. 447.

[2] Ibid., pp. 677–83.

[3] Ibid., pp. 604–8, 615–19.

These essential features of the proposals passed into the final text of the Charter, but were there no more precisely expressed. Thus, though Article 86 implies that the Trusteeship Council is to be composed exclusively of 'Members of the United Nations'—falling into the three classes of 'those Members administering trust territories', 'those Members' not administering trust territories which are permanent members of the Security Council, and 'as many other Members' as shall secure an equality of numbers between those administering trust territories and those not—Article 81 provides less specifically that an administering authority 'may be one or more states or the Organization itself'. This wording is probably accidental and the assumption, recently acted upon without discussion,[1] that a state which is not a Member of the United Nations may become[2] an administering authority of a trust territory, seems therefore to be without warrant.

However, as mentioned, the history of Chapter XII of the Charter does not furnish any unequivocal support for the thesis that the trusteeship agreements which it contemplates were envisaged as treaties to which the United Nations would be a contracting party. On the contrary, both the text and the *travaux préparatoires* of that chapter indicate rather that, apart from the exceptional case of direct administration, the United Nations is probably intended to have a supervisory rather than a participant role in the administration of trust territories. Thus what was contemplated in the United States–French–Chinese–Soviet Russian proposals was a 'system', to be supervised by a Council on which the administering states, amongst others, were to be represented.[3] The United Kingdom proposals, which were more vague, contemplated a somewhat different arrangement coming close to the establishment of the relation of principal and agent between the United Nations and the individual 'advanced nation' which 'should be made, or should remain' responsible for the 'tutelage' of dependent peoples 'on behalf of the United Nations'.[4] The difference between this scheme, which the Australian Government endorsed, and the proposals of the other major Powers was well expressed by the Australian delegate to Committee II/4 as being on the issue 'whether the application of the trusteeship system to territories other than League mandates and ex-enemy dependencies should be left to the voluntary action of the powers responsible for their administration'.[1] The delegate of the U.S.S.R. echoed this theme, suggesting that the United Nations should be responsible for designating administering authorities, and calling for a further definition of 'the states directly concerned'. He expressed the opinion that, if his proposals were to be adopted, 'every Member of the United Nations would be responsible for the system to be established'.[2] There was thus a competition between two—or, taking account of the U.S.S.R. amendment to the United States proposals, three—schemes of control. Each of these envisaged the United Nations in a superior rather than a co-ordinate position in relation to the administering authorities. And although the main difference between these schemes was the question as to the extent to which it should be compulsory to place territories under the system, it was not suggested in any of them that a treaty to which the United Nations should be a contracting party was essential to it.

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[1] In connexion with the designation of Italy as administering authority for Italian Somaliland (see Resolution 289 (IV) B, United Nations, *Official Records of the Fourth Session of the General Assembly, Resolutions*, pp. 10, 11).

[2] The question whether a state which ceases to be a Member of the United Nations may *remain* an administering authority is a different one. The 'authoritative interpretation' by the United Kingdom and United States delegations, which was annexed to the Report of the Rapporteur of Committee II/4 but not regarded as an expression of the view of the Committee, is to the effect that this may be the case (see *U.N.C.I.O. Documents*, vol. x, pp. 620–1). This affords no necessary support for the thesis that a non-Member state may *become* an administering authority.

[3] *U.N.C.I.O. Documents*, vol. iii, pp. 604–8, 615–19.

[4] Ibid., p. 610.

If, however, the frequent use of the term 'agreement' in the various drafts did not thus mean an agreement with the United Nations as such, the question arises as to what it did mean. It is possible that it referred to an agreement between states having a right to participate in the administration of a territory liable to be placed under the trusteeship system. In the case, for instance, of territories to be detached from enemy states at the end of the then war, there would be a plurality of states possessing that right—of 'states directly concerned'. In relation, too, to mandated territories, in view of the rights therein secured to Members of the League other than the mandatories, there would likewise be a number of 'states directly concerned'. But in this case their number would be so considerable and their viewpoints likely to be so diverse that the conclusion of a formal agreement between them would be a cumbersome proceeding. With regard to a colony voluntarily placed under the system, it is difficult to see how there could ordinarily be more than one state—the metropolis—'directly concerned'. Its 'agreement' would thus be more correctly described as a 'consent'. Finally, if the interests of the Allied states, other than the four parties to the Moscow Declaration, in the disposal of territories to be detached from the then enemy states, and of Members of the League other than the mandatories in the transformation of the mandate system, be discounted as not constituting 'direct' concern—as well they may—it might appear that 'agreement' in the drafts referred to does not imply more than unilateral consent.[3]

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[1] *U.N.C.I.O. Documents*, vol. x, pp. 428–9.

[2] Ibid., p. 441.

[3] The obligations of administering authorities under the trusteeship system are thus to be contrasted with those under Chapter XI of the Charter, i.e. the Declaration regarding Non-Self-Governing Territories. The former are voluntarily undertaken and vest only when the state involved consents or agrees to that end. The latter are automatic. This interpretation is borne

Nevertheless, the result of the consideration of Chapter XII of the Charter does not go beyond the conclusion that the 'trusteeship agreements' of which it speaks are instruments *sui generis*. Whatever their claim to be designated 'treaties', they are without doubt acts in the law, creative of rights and duties. For it was assumed from the beginning that the 'agreements' in question should provide safeguards for the inhabitants of trust territories and rights for third states in such territories akin to those specified in relation to mandated territories in Article 22 of the Covenant and in the several League mandates. But the trusteeship system differs from the mandates system in some material respects. The contractual character of the mandates has seldom, if ever, been denied.[1] The necessity for the acceptance of the mandate by the mandatory Power, and for the approval of the selection of the mandatory Power by the Principal Allied (and Associated) Powers or, according to another interpretation, by the League, rendered any other view untenable.[2] Nevertheless, not all the mandates assumed the traditional form of a treaty. Nor was the contractual element the only feature of the mandates. In the matter of the relations of the mandatory Power with the inhabitants of a mandated territory, they partook rather of the nature of the trust of English Equity.[3] The influence of this

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out by the denial that there is any obligation to place a mandated territory under the trusteeship system which is involved in the General Assembly's rejection, in connexion with the case of South-West Africa, of the Fourth Committee's conclusion that it was 'the clear intention of Chapter XII that [mandated territories] until granted self-government or independence shall be brought under the International Trusteeship System' (see Goodrich and Hambro, op. cit., p. 433). Cf. also the terms of Art. 80 of the Charter and the observations thereon of the South African delegate (*United Nations, Official Records of First Part of the First Session of the General Assembly, Fourth Committee, Summary Records*, p. 10).

At the San Francisco Conference there was no attempt to reach agreement as to the meaning of the phrase 'the states directly concerned', though it was agreed, as indeed Art. 79 of the Charter now declares, that at least the mandatory Power would be 'directly concerned' in the case of a mandated territory (*U.N.C.I.O. Documents*, vol. x, p. 476). It is also stated that: 'It was generally assumed that in the case of territories falling within category (*c*) of Article 77 (1), the State responsible for the administration of the territory was also "directly concerned". And presumably in the case of a territory detached from an enemy State as a result of the Second World War, the State in actual occupation would be "directly concerned". Beyond that there was little agreement' (Goodrich and Hambro, op. cit., p. 438). If this passage must be taken to mean that in the case of a territory voluntarily placed under the trusteeship system by the sovereign thereof there may be 'directly concerned' states other than the latter, it is submitted that it does not represent the feeling of Committee II/4 of the Conference See also n. 2, p. 125 *supra*.

[1] Cf. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), ch. iv.

[2] In the case of the A Mandates, Art. 96 of the abortive Treaty of Sèvres provided that 'the terms of the mandates . . . will be formulated by the Principal Allied Powers and submitted to the Council of the League of Nations for approval'. In conformity with this provision the draft mandate for Palestine, which was elaborated by the United Kingdom Government after the failure of the Milner Commission to reach agreement on a common formula for all the A Mandates, recited that the Council 'hereby approves the terms of the said mandate. . . .' The Council, however, substituted the formula 'whereas by . . . Article XXII (paragraph 8) [of the Covenant] it is provided that the degree of authority, control or administration to be exercised by the Mandatory not having been previously agreed upon by the Members of the League, shall be explicitly defined by the Council . . . [the latter] confirming the said mandate, defines its terms as follows . . .' (see Stoyanovsky, *The Mandate for Palestine* (1928), p. 319).

[3] It is to be observed that the *mandatum* of Roman Law resembled a contract *re* rather than a

concept upon the trusteeship system—as, again, the nomenclature employed indicates—is yet more considerable. Correspondingly, the contractual element is of diminished significance within the latter system. The second of these differences is in no small measure due to the circumstance that the mandates system preceded the trusteeship system. The former was a device without precedent, applied to territories removed from the control of former enemies in favour of a multitude of conquerors, all interested in the fruits of their victory. The latter, in contrast, was primarily designed merely as an elaboration and perpetuation of the existing and functioning mandates system, under which the mandatory Powers were already, as it were, in possession. In relation to mandated territories and, equally, to territories to be voluntarily placed under the new system, the necessity for a conveyancing contract—the need to endow administering authorities with a title by treaty—did not exist. This circumstance, and the fact that the new system was associated with a declaration of general principles respecting the administration of all 'non-self-governing territories',[1] naturally shifted the emphasis from the 'mandate' to the administering authority, from a plurality of interested mandants to the 'trust' undertaken by such authority in favour of the inhabitants of the territory administered.[2]

4. *Article 105. Agreements Relating to Privileges and Immunities*

Article 105 (3) of the Charter provides that:

> 'The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article [i.e. of the stipulations that both the United Nations and its officials and the representatives of its Members shall enjoy such immunities and privileges as are necessary for the functioning of the Organization] or may propose conventions to the Members of the United Nations for this purpose.'

As suggested above, it was probably this provision which the International Court of Justice had principally in mind when it spoke of the Charter as

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contract *consensu* (Buckland, *A Text Book of Roman Law* (1921), p. 516). It thus had a significant resemblance both to the bailment and the trust of English law, in which the consensual element is in a sense incidental rather than essential. But as to the danger of analogies from the common law—or of equating Roman law with 'general principles of jurisprudence'—see Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), ch. iv. A more exact analogy of the trust was adopted, in relation to the Saar, in Art. 49 of the Treaty of Versailles (see ibid., p. 202, n. 1, and Bisschop, *The Saar Controversy* (1924)).

[1] See Chapter XI of the Charter. Compare Art. 23 (*b*) of the Covenant of the League of Nations and see the distinction between the *principle* of trusteeship which should guide colonial Powers in the administration of their dependent territories and the creation of a special *system* of international machinery to apply to certain specified territories, drawn in the explanatory note to the United Kingdom proposals respecting trusteeship (*U.N.C.I.O. Documents*, vol. iii, p. 611).

[2] See Duncan Hall, *Mandates, Dependencies, and Trusteeship* (1948), pp. 33, 97–100, 121–9, 277–92. It is to be noted that the term 'trust' is employed also in Chapter 73 of the Charter, i.e. in the Declaration regarding Non-Self-Governing Territories, to which the trusteeship system does not necessarily apply.

'providing for the conclusion of agreements between the Organization and its Members'.[1] In purported pursuance of it there has been concluded, as will be shown, an agreement between states to which the United Nations as such was not a contracting party but which relates to its privileges and immunities, and two agreements to which the Organization and one state Member are the contracting parties. It was to the first of these that the Court referred. In the following section of this article an attempt will be made to show that the instancing of this agreement by the Court as evidence of a practice of 'conclusion of conventions to which the Organization is a party', may be open to question.[2] Without prejudice to the questions as to whether or not the Charter does provide for the conclusion of agreements between the United Nations and its Members and as to whether or not the former does in fact enter into conventions, it may be here pointed out that a convention to which each of its Members but not the United Nations itself is a party is exactly what Article 105 (3) would appear to envisage. That the principal instrument thus contemplated which has in fact been concluded confers rights upon the United Nations has, strictly speaking, no significance for the question as to whether or not that Organization can conclude treaties.[3] The question still remains as to whether a convention on the privileges and immunities of the Organization concluded under Article 105, whosoever the parties, is a treaty at all. The view that the 'determining of the details of the application' of stipulations already made is not a distinct act in the law would seem to be at least plausible.[4]

5. *Other Provisions*

Given the wide interpretation of the term 'treaty-making power' which has been adopted so far, are there other specific provisions of the Charter conferring such power upon the United Nations? The question is distinct from, though connected with, that as to what residuary treaty-making power is to be collected from the general competence of the United Nations. That the Organization may possess such a residuary power would appear probable. A power to conlude treaties was, as has been seen, attributed to the League of Nations despite the fact that there was no specific mention of it in the Covenant.[5] Of the United Nations the International Court of Justice has said:

> '. . .[T]he Organization is a political body, charged with political tasks of an important character, and covering a wide field namely, the maintenance of international peace and security, the development of friendly relations among nations, and the

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[1] *Supra*, p. 109.

[2] *Infra*, p. 142.

[3] See p. 109 *supra*.

[4] Compare the discussion as to the status of the 'special agreements' therein contemplated in relation to Art. 43 of the Charter, p. 120 *supra*.

[5] *Supra*, p. 108.

> achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character (Article 1); and in dealing with its Members it employs political means. . . .
>
> 'It must be acknowledged that its Members, by entrusting certain functions to it, have clothed it with the competence required to enable these functions to be effectively discharged. . . . Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as *specified or implied in its constituent documents and developed in practice*.'[1]

Though that reasoning was directed specifically to the conclusion that the Organization had been invested with capacity to bring international claims, it is no less relevant to the conclusion that it possesses a residuary as well as a specific treaty-making power. In view of this it may be unnecessary to strain the text of the Charter in an attempt to read into it specific authorization to the United Nations to conclude other kinds of treaties than those already dealt with. It may thus be preferable not to draw from the authority given by Article 62 (3) to the Economic and Social Council to 'prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence', any unnecessary, and indeed highly doubtful, conclusions that such conventions are or include those to which the Organization may be a party. Nor would it seem necessary to misinterpret in that way Article 59, whereunder the United Nations is empowered to 'initiate negotiations among the states concerned for the creation of any new specialized agencies required' (for the accomplishment of the broad social and economic aims of Chapter IX of the Charter). There is probably no warrant for the view that its text will permit of the Organization being itself a party to the constituent instrument of a new specialized agency.[2]

Such provisions as those here discussed ought to be given their natural meaning and not to be confused with the authorizations to the United Nations to conclude treaties which the Charter also contains. But, as has been seen, the provisions which occur to the mind as more obviously open to the construction that they envisage the conclusion of treaties by the Organization—namely, Articles 43, 63, and 105, and Chapter XII—are none of them as clear and unequivocal as might be wished and it may be necessary to give an extended interpretation to the term 'treaty-making power' in order to justify their classification as sources of such power. Where, then, must the line be drawn? Why should not the 'clear words' of Article 105 (3) ('the General Assembly . . . may propose conventions to the

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[1] *I.C.J. Reports*, 1949, p. 182.

[2] Cf. also the responsibility of the Security Council under Art. 26 'for formulating . . . plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments', and compare with the text thereof that of Art. 14 of the Covenant of the League of Nations, as to which see n. 7, p. 113 *supra*.

Members of the United Nations' in the matter of the details of its privileges and immunities under that article) be regarded in the same way as the no less 'clear words' of Article 59 ('The Organization shall . . . initiate negotiations among the states concerned for the creation of any new specialized agencies . . .') as contemplating treaty relations amongst states only? The specific answer here, as with respect to the General Convention on the Privileges and Immunities of the United Nations, to which the International Court of Justice would appear to have regarded the United Nations as a 'party', is perhaps to be found in the 'peculiar legal character' of the instrument in question. It is thus part of the more general answer, which is that the functions of an international organization as 'specified or implied in its constituent documents' may be 'developed in practice'. That practice will now be considered.

IV. *The practice of the United Nations with respect to the making of treaties*

The growth in practice of an unwritten portion of the constitution of the United Nations renders it to some extent unprofitable to survey its treaty relations under the more or less precise heads of the treaty-making power which are to be found in the Charter. Thus under one of these heads—Article 43[1]—no treaties at all are to be found owing to the failure, so far, of its permanent Members to agree on the general principles governing the organization of the armed forces to be made available to the Security Council under that article. Similarly, whilst treaties have been made in pursuance of Article 105 with and among Members as to the privileges and immunities of the United Nations, a treaty on the same subject has been made with a non-Member state—a treaty which must be considered together with those concluded within the circle of Members. Thirdly, the interpretation of the element of 'agreement' by 'the states directly concerned' involved in the setting up of the trusteeship system has been in practice so ambiguous as to rob the majority of the trusteeship agreements of even the appearance of treaties. It is very difficult to regard those instruments as treaties made exclusively between 'the states directly concerned' for a variety of reasons. Thus in the course of the debates upon them in the General Assembly and Security Council specific denials that they have that character have been made.[2] Moreover, whatever the rights and duties thereunder of states which may be considered, upon one or another thesis, to be 'directly concerned', they are not different from those of the generality of Members of the United Nations.[1] On the other hand, there remains the alternative theory: that the trusteeship agreements are treaties between the United Nations and the different administering authorities. The very insusceptibility of the agreements to classification as inter-state treaties supports this view of them. So also does the fact that the 'approval' of the appropriate organ of the United Nations is a solemn process, essential to their validity. And so, perhaps, does the administrative recognition of the agreements as 'treaties' or 'international agreements' to which the United Nations is a party for the purposes of the registration provisions of Article 102 of the Charter.[2] It is thus possible to regard the investigation of the legal character of the trusteeship agreements as within the scope of the present paper. But the detailed examination of the process of their drafting and entry into force must for the moment be excluded from what is already a lengthy study. An additional reason for this course is provided by the circumstance that one important aspect of the question is *sub judice*. For by Resolution 338 (IV), dated 6 December 1949, the General Assembly requested an advisory opinion of the International Court of Justice as to whether, *inter alia*, the provisions of Chapter XII of the Charter are 'applicable', and if so, in what manner, to the Territory of South West Africa.[3]

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[1] See above, p. 118.

[2] See in particular the statements of the delegation of the United States: *United Nations, Official Records of the Second Part of the First Session of the General Assembly, Joint Committee, Part I, Summary Records*, pp. 75–6; ibid., *Official Records of the Security Council, Second Year*, pp. 476, 670.

For these reasons it is more convenient to survey the practice of the United Nations so far under topical heads rather than by reference to the provisions of the Charter discussed already.

1. *Agreements with other international organizations*

(*a*) *General.* The Executive Committee of the Preparatory Commission of the United Nations considered that Article 57 of the Charter made it 'mandatory upon the Organization and upon Members of the United Nations to undertake to bring into relationship with it the various specialised agencies'.[4] This might be taken to indicate an interpretation of the article in question as an 'agreement to agree' and an implicit denial to the agreements therein envisaged of the quality of acts in the law distinct from the Charter.[5] The Executive Committee also endorsed the view, expressed at the San Francisco Conference, that the category of specialized agencies does not exhaust the totality of intergovernmental agencies and that the Economic and Social Council therefore has not only a specific power to make treaties or agreements with specialized agencies under Articles 57 and 63, but also a residuary power to 'negotiate agreements with such other intergovernmental agencies, including those of a regional character, as are not considered as being within the definition of Article 57, but which it is desirable to bring into relationship' with the organization.[1] It might have been expected, therefore, that there would develop two distinct categories of inter-organizational treaties to which the United Nations was party. However, a pronounced and increasing uniformity in this matter has been characteristic of the relations between the United Nations and other organizations. This tendency had gone so far that, when in 1947 negotiations were begun with the Universal Postal Union for the bringing of that institution into relationship with the United Nations, the Union was informed that the end in view could only be achieved by its acceptance of the status of a specialized agency.[2]

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[1] See the 'most-favoured-nation' clauses therein, typified by Art. 9 of each of the agreements for Tanganyika, Togoland, and Cameroons under British administration, *United Nations Treaty Series*, vol. viii, pp. 91, 151, 119. See also the clauses (Art. 11 in each of the agreements mentioned) providing for the settlement of disputes between the administering authority and 'another Member of the United Nations'. As to the question whether the latter constitute an acceptance, not only by the administering authority concerned, but also by every other Member of the United Nations, of the compulsory jurisdiction of the International Court of Justice, see Sloan in this *Year Book*, 25 (1948), pp. 1, 23; see also Lauterpacht in ibid., at p. 368.

[2] See Schachter, loc. cit.

[3] *United Nations, Official Records of the Fourth Session of the General Assembly, Resolutions*, p. 45.

[4] *Report*, p. 102.

[5] But see p. 137 *infra*.

In the light of this development of practice it is probably justifiable to regard such treaties with international organizations other than the specialized agencies as the United Nations has in fact concluded as not being typical. The treaties in question are certain arrangements made with the League of Nations and with U.N.R.R.A. They have not constituted precedents for other treaties. Neither were they entered into in the exercise of the inherent powers of the Economic and Social Council. They were concluded in pursuance of the functions of the General Assembly as the supreme or chief representative organ of one general international organization succeeding another.

(*b*) *The succession to the League of Nations.* The agreements with the League alone represented a stage in the general succession to, or supersession of, that institution by the United Nations.[3] From the point of view of the League, they presented three aspects: succession to its tangible assets, continuance of its technical services, and succession to such of its functions as derived from treaties.[4] From the point of view of the United Nations, however, a somewhat different division of the estate seemed advisable. In political reality, if in not every respect in strict law, the

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[1] *Report*, p. 102.

[2] See *Union Postale Universelle, Documents du Congrès de Paris* (1948), vol. ii, p. 200; and see this *Year Book*, 25 (1948), p. 460.

[3] See, generally, Myers in *American Journal of International Law*, 42 (1948), pp. 320–51, and McKinnon Wood in this *Year Book*, 23 (1946), pp. 317–23.

[4] The League issued in 1944 and 1945 three very valuable publications as to its functions and activities with a view to their transfer to a successor organization: *Powers and Duties attributed to the League of Nations by International Treaties* (C. 3, M. 3, 1944, VI), *List of Conventions with Indications of the Relevant Articles conferring Powers on the Organs of the League* (C. 100, M. 100, 1945, VI), and *The Committees of the League of Nations: Classified List and Essential Facts* (C. 99, M. 99, 1945, V 2).

Charter superseded the Covenant. While it appeared advantageous to accept all assets in the widest sense, it was inexpedient to take over any part of the League's political *hereditas damnosa*. The 'League of Nations Committee' of the Executive Committee of the Preparatory Commission therefore drew a distinction between the political and other functions and assets of the League. It proposed to the General Assembly that it should reject utterly the former but take over the whole of the latter subject to a right of disclaimer of 'any particular function or power' found upon consideration to be unwelcome.[1] This variation of the *beneficium inventarii* probably oversimplified the problem inasmuch as it ignored the distinction between those assets, services, and secretariat functions which belonged exclusively to the League and which could in consequence be handed over by it, and those functions conferred by treaty to the transfer of which the consent of the contracting states was requisite. Accordingly a fresh start had to be made. The United Nations instituted a survey of 'the functions and activities of a non-political character . . . hitherto performed by the League of Nations' other than mere secretarial functions (which the General Assembly declared its willingness to take over and with which it charged the Secretary-General), with a view to their being taken up rather than taken over by its own organs and by the specialized agencies.[2] The new Organization, through the General Assembly, likewise instructed its Secretary-General to 'make provision for taking over and maintaining in operation the Library and Archives, and for completing the League of Nations treaty series'. In addition the General Assembly approved the 'common plan for the transfer of the [other physical] assets of the League' prepared by negotiators acting on behalf of both the Preparatory Commission and the League, and set up a committee 'to assist the Secretary-General in negotiating further agreements' to the same end.[3] Thus, from the point of view of the embryonic law of succession of international organizations, the fate of the political rights and duties of the League was left undetermined, and such questions as that of the continued validity of the obligations stipulated for in Article 10 of the Covenant remain open.[4] As regards the League's non-political rights and duties, a species of succession to some of them ultimately took place through amendment, by agreement between all or most of the contracting parties thereto, of the various instruments by which they were originally created. Thus protocols were drawn up amending the various international agreements on narcotics, the conventions for the suppression of the traffic in women and children, and in obscene publications, and the international convention relating to economic statistics. These protocols in general endowed the United Nations with the former functions of the League.[1] However, even within the non-political sphere the United Nations did not assume all the functions of the League.[2]

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[1] *Report*, pp. 108–14.

[2] *United Nations, Resolutions adopted by the General Assembly during the First Part of its First Session*, pp. 35–6.

[3] Ibid., p. 36.

[4] See thereon Myers, loc. cit., pp. 330–1, 332. Another interesting question is the present status of the treaties and declarations for the protection of minorities. Whether the protection of minorities is a 'political' function is a question of words. In so far as the League's concern therewith was derived from Art. 23 of the Covenant, it could be classed as 'non-political' (ibid., pp. 322, 335).

Direct treaty relations between the United Nations and the League were confined to the question of transfer of physical assets. Conceivably the 'common plan' itself should be considered as a treaty on this question. It was in any event implemented by a series of further agreements such as the Agreement Concerning the Execution of the Transfer to the United Nations of Certain Assets of the League of Nations, signed at Geneva on 19 July 1946,[3] and many others.[4]

(*c*) *Agreements with U.N.R.R.A.* Not materially different from the agreements between the United Nations and the League of Nations are those between both these organizations and the United Nations Relief and Rehabilitation Administration concluded on 19 July and 28 August 1946.[5] These tripartite instruments related exclusively to the arrangements for the holding of the fifth session of the Council of U.N.R.R.A. at the *Palais des Nations*, and the fact that there are three parties to them is accounted for by the circumstance that the conference in question was due to be held exactly at the time of the transfer of the League's assets to the United Nations.

(*d*) *Agreements under Articles 57 and 63.* In general, with regard to the agreements concluded by the United Nations in pursuance of Articles 57 and 63 of the Charter, the Preparatory Commission intimated to the United Nations what the content of such agreements should be. These indications consisted in a list of items 'deemed appropriate either for inclusion in the agreement or for suitable action either by the General Assembly or by the Economic and Social Council'. The items in question fall into two categories: those derived from the provisions of the Charter, and others which, 'though not emanating directly from the Charter [were] considered important in the general plan of relationships with the specialised agencies'. The first category embraced reciprocal representation (Art. 70 of the Charter), the co-ordination commission of the Economic and Social Council (Arts. 63 (2) and 68), recommendations to the specialized agencies (Arts. 58, 62, 63 (2)), reports (Art. 64), decisions of the Security Council (Art. 48), assistance to the Trusteeship Council (Art. 91), requests for advisory opinions (Art. 96), requests for information by the International Court of Justice (Art. 54 of the Statute thereof) and budgetary and financial relations (Art. 17).[1] This list is interesting inasmuch as it shows that from the outset Article 63 was interpreted as authorizing the regulation by agreement of every aspect of the relations between the United Nations and the specialized agencies, and not merely those coming within the scope of the material activities of the Economic and Social Council.[2] As to the topics not emanating directly from the Charter, these comprised: liaison, proposal of agenda items, rules of procedure, common fiscal services, personnel arrangements, privileges and immunities, an administrative tribunal, technical services, a central statistical service, and the location of headquarters.[3] These recommendations were endorsed without change by the General Assembly. At the first meetings of the Economic and Social Council they were examined in greater detail. Whilst it was decided that all matters arising from the Charter should be dealt with in every agreement to be made, the proposal for a common code of procedure was omitted altogether, and it was resolved to make the question of the location of headquarters one with respect to which the Negotiating Committee of the Council would merely 'present the advantages of centralisation'.[4] This Negotiating Committee was immediately set up. It began, in May 1946, to discuss tentative drafts prepared by the United Nations Secretariat in consultation with the respective secretariats of the International Labour Organization, the Food and Agriculture Organization and the Preparatory Commission of U.N.E.S.C.O. The three definitive drafts actually achieved in 1946 revealed a remarkable tendency towards standardization. There was, however, one difference between them which gave rise to much discussion notwithstanding that it was probably more apparent than real.[1] This related to the authorization of the agencies concerned to request advisory opinions of the International Court of Justice. The International Labour Organization was granted liberty to request such an opinion on any legal question within the scope of its activities, other than a question concerned with its relationships with the United Nations or with other specialized agencies, subject to the sole condition that it should inform the Economic and Social Council of any request made. To U.N.E.S.C.O., on the other hand, there was conceded the right to request advisory opinions on like questions only on prior notice to the Economic and Social Council, which reserved to itself a limited veto, subject to a right of appeal to the General Assembly, on any request considered in its judgment to be undesirable. Subsequently the same right was granted to the Food and Agriculture Organization.[2]

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[1] See the Protocol signed at Lake Success on 11 December 1946 amending the various Agreements, &c., on Narcotic Drugs (*United Nations Treaty Series*, vol. xii, p. 179); the Protocol amending the agreements, &c., for the suppression of the white slave traffic (U.N. Doc. A/810); the draft protocols to amend the convention for the suppression of the traffic in women and children, &c., and to amend the convention for the suppression of the traffic in obscene publications (*United Nations, Official Records of the Third Session of the General Assembly, Part I, Resolutions*, pp. 165–71); and the Protocol signed at Paris on 9 December 1945 amending the International Convention on Economic Statistics (*United Nations Treaty Series*, vol. xx, p. 229).

[2] Resolution 79 (1), adopted on 14 December 1946 after the elaboration of the system of Commissions of the Economic and Social Council, authorized and requested the latter body to assure and continue the non-political functions and activities of the League except for those (*a*) exercised pursuant to international agreements, or (*b*) entrusted to specialized agencies (*United Nations, Resolutions adopted by the General Assembly during the Second Part of its First Session*, p. 139). To what extent the protection of minorities comes within the scope of this resolution is an interesting speculation.

[3] *United Nations Treaty Series*, vol. i, p. 109. This agreement was concluded 'for the purpose of determining the details of the transfer of the ownership of the assets . . . mentioned . . . in . . . the Common Plan' and provided for the execution of the necessary transfers of immovable property and the inventorizing and handing over of movable property on 1 August 1946, and for the use of the property by the League from the date of transfer until the liquidation of the latter body.

[4] Ibid., vol. i, pp. 119, 131, 135; vol. iv, pp. 442, 449; vol. v, pp. 389, 395.

[5] Ibid., vol. i, pp. 97, 139; see also the Additional Protocol of 10 July 1947 (ibid., vol. v, p. 401).

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[1] *Report*, p. 101.

[2] It was thus expressly stated in regard to the question of representation of the specialized agencies in the Committees of the General Assembly that 'the silence of the Charter with regard to such representation does not appear to preclude the General Assembly from making provisions in its rules of procedure for representation of this character, nor from authorizing the Economic and Social Council to include an appropriate provision in the agreements with certain of the specialized agencies' (ibid., p. 103).

[3] Ibid., pp. 103–8.

[4] See U.N. Doc. E/1317, p. 7.

(*e*) *The Legal Character of the Agreements under Articles 57 and 63.* At the time of writing eleven substantive agreements have been concluded in accordance with Article 63, and two more are in the stage of negotiation.[3]

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[1] See this *Year Book*, 23 (1946), p. 405.

[2] See the note following.

[3] The agreements so far concluded are with the International Labour Organization (*United Nations Treaty Series*, vol. i, p. 183); the Food and Agriculture Organization (ibid., vol. i, p. 207); the United Nations Educational, Scientific and Cultural Organization (ibid., vol. i, p. 233); the International Civil Aviation Organization (ibid., vol. viii, p. 315); the International Refugee Organization (ibid., vol. xxvi, p. 299); the World Health Organization (ibid., vol. xix, p. 193); the International Monetary Fund (ibid., vol. xvi, p. 325); the International Bank for Reconstruction and Development (ibid., vol. xvi, p. 341); the Universal Postal Union (ibid., vol. xix, p. 219); the International Telecommunications Union (see U.N. Doc. A/370, p. 12); and the Inter-governmental Maritime Consultative Organization (see Resolution No. 204 (III), *United Nations, Official Records of the Third Session of the General Assembly, Part I, Resolutions*, p. 43, and see this *Year Book*, 25 (1948), pp. 437–47). Agreements with the projected International Trade and World Meteorological Organizations are in contemplation (see U.N. Doc. E/1317).

Some of the earlier agreements not having contained any stipulation on the use by the specialized agencies of the United Nations *laissez-passer*, these have been supplemented by protocols of amendment, adding such stipulations; see, for example, *United Nations Treaty Series*, vol. xxi, p. 338 (F.A.O.); ibid., vol. xxi, p. 341 (U.N.E.S.C.O.); ibid., vol. xxi, p. 347 (I.C.A.O.); and see *United Nations, Official Records of the Fourth Session of the General Assembly, Resolutions*, p. 59, and *Annex to the Sixth Committee* (U.P.U.). See also p. 142 *infra*.

It is to be noted that this list does not exhaust the tale of agreements between the United Nations and such specialized agencies as have been brought into relationship with the former in accordance with Arts. 57 and 63 of the Charter. There has also to be considered, for instance, the Memorandum of Agreement concerning the procedure to be followed for the deposit and registration with the United Nations of International Labour Conventions, &c. (*United Nations Treaty Series*, vol. xxvi, p. 323; see p. 140 *infra*).

As to the agreements between the United Nations and organizations other than specialized agencies within the sense of Art. 57, see the agreements with the League of Nations and with U.N.R.R.A. discussed *supra*, pp. 133–5.

It is also to be noted that the list does not exhaust the category of agreements to which the specialized agencies are parties: see also (1) agreements between the specialized agencies and States: the Agreements between the International Labour Organization and the World Health Organization, respectively, and Switzerland: *United Nations Treaty Series*, vol. xv, p. 377; vol. xxvi, p. 331 (with which the agreements between the United Nations and Switzerland, ibid., vol. i, pp. 153, 163, between the United Nations and the United States, ibid., vol. xi, p. 11, and

The first of them, that with the International Labour Organization, constitutes the 'standard pattern'.[1] It comprehends articles touching in effect every item regarded by the Executive Committee of the Preparatory Commission as capable of derivation from the Charter and, as well, most of the 'optional' items—but not privileges and immunities, or rules of procedure. On the subject of budgetary and financial relationships it is somewhat tenuous, the specialized agency concerned merely recognizing 'the desirability of establishing close budgetary and financial relationships' and agreeing to consult 'concerning the desirability of making appropriate arrangements' by supplementary agreement 'for the inclusion of [its] budget within a general budget of the United Nations'. It also agrees to consult the United Nations in the preparation of its budget. Many of the stipulations of the standard agreement amount to no more than professions of a desire for close administrative co-operation.[2] As a result, the quality of the agreements as acts in the law is not immediately apparent, quite apart from the question of the relation of their stipulations to the Charter. Obligations to include items proposed upon agenda, 'to arrange for the submission, as soon as possible, to the appropriate organ . . . of all formal recommendations', 'to

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vol. xix, p. 43, and between the International Court of Justice and the Netherlands, ibid., vol. viii, p. 61, are to be compared); and (2) agreements between specialized agencies and other organizations: (*a*) inter-specialized agency agreements: ibid., vol. xviii, p. 335 (I.L.O.—F.A.O.), vol. xviii p. 345 (I.L.O.—U.N.E.S.C.O.), and vol. xix, p. 269 (I.L.O.—W.H.O.); and (*b*) agreements between specialized agencies and other organizations, e.g. ibid., vol. xix, p. 187 (I.L.O.—League of Nations). (See also the *draft* agreements between W.H.O. and U.N.E.S.C.O. and F.A.O. respectively, W.H.O. Documents W.H.O. I.C./R/18/Rev. 3, W.H.O. I.C./167.)

There requires also to be considered the Convention on the Privileges and Immunities of the United Nations, which provides both for accession by states (s. 41) and for 'acceptance' by the specialized agencies (s. 37): text in *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 114.

The foregoing collection of references, which is certainly not exhaustive, to the treaties of international organizations indicates that the materials for the study of the treaty-making power of such organizations are already considerable and that the scope of the subject goes considerably beyond that of this paper.

[1] For a most useful historical and analytical account of the agreements see U.N. Doc. E/1317 (*Report of the Secretary-General on Action taken in Pursuance of the Agreements between the United Nations and the Specialized Agencies*) prepared in pursuance of Resolutions 50 (1) (*United Nations, Resolutions adopted by the General Assembly during the Second Part of its First Session*, p. 78) and 124 (11) (*United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 28), whereby the Economic and Social Council was requested to follow carefully the progress of collaboration with the specialized agencies and to report thereon after a trial period of three years.

[2] For a critical survey of the extent to which such co-operation has been achieved in practice, the conclusion of which is 'that the problem of coordination within the United Nations system is not one of inadequate machinery but of a clearer realization of the functions of coordination, of more adequate utilization of existing machinery and in some cases the simplification of that machinery', see *Coordination of Economic and Social Activities, United Nations Studies*, 2 (1948), prepared jointly by Walter R. Sharp and the Carnegie Endowment. At its Fourth Session the General Assembly, by Resolution 309 (iv), decided 'to take no measures at this session for the revision of the agreements with the specialized agencies' but called for a report from the Economic and Social Council on the subject and also, in Resolution 310 (iv), expressed its concern over the 'proliferation of activities and multiplicity of projects and programmes' which has developed (*United Nations, Official Records of the Fourth Session of the General Assembly, Resolutions*, p. 29).

co-operate . . . in furnishing such information and rendering such assistance to the Security Council as that Council may request', 'to cooperate . . . in giving effect to the principles and obligations set out in Chapter IX of the Charter with regard to matters affecting the well-being and development of the peoples of non-self-governing territories', or even for 'the fullest and promptest exchange of information and documents', are difficult to classify as legal obligations. The agreements establish a régime. Once they are concluded, their contractual aspect ceases to be of much relevance. They are international statutes, establishing a species of international administrative law, as much as contracts.

It is for this reason that the agreements in question do not, as a rule, contain any provision as to termination. Those with the International Bank and the International Fund do indeed stipulate that they may be terminated upon the giving of six months' notice on either side, a concession obtained by those institutions on the plea of their special character. But in general the agreements are of perpetual duration, though they may be revised by mutual consent.[1] In other formal respects, however, they conform to the traditional pattern of treaties. They are thus set out in 'Articles' and in general couched in the language of mutual promises. They are made subject to a species of 'constitutional ratification', such as, on the side of the United Nations, the requirement that they should be approved by the General Assembly. In consequence, they are supplemented by protocols of entry into force, reciting the appropriate resolutions of approval.

(*f*) *Agreements under Articles 57 and 63. Membership of the United Nations and Membership of Specialized Agencies.* The revised version of the Constitution of the International Labour Organization provided that 'Any original Member of the United Nations and any state admitted to membership of the United Nations . . . may become a Member of the International Labour Organization by communicating . . . its formal acceptance of the obligations of the Constitution. . . .'[2] This provision represented the primitive method of linking the membership of the United Nations with that of the specialized agencies. The improvement of that link has been the object of constant effort. Its most recent formulation secures to Members of the United Nations an absolute right to membership of the specialized agency concerned. It accords in general to such agency the right to admit other states to membership. It also contains the provision that 'No State . . . may become or remain a member . . . contrary to a resolution of the General

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[1] 'While all the other United Nations-agency accords rightly are subject to revision by mutual agreement of the parties, the indefinite continuance of an agreement of some sort is presumed. The Bank and the Fund were the only agencies to take . . . an extreme "treaty" view of their relationship with the United Nations' (*Co-ordination of Economic and Social Activities*, *cit. supra*, p. 138, n. 2). As to the curious interpretation put upon the provision for revision by mutual agreement by the U.P.U., see this *Year Book*, 25 (1948), p. 462, n. 2.

[2] Art. 1 (3).

Assembly of the United Nations'.[1] In the case of the Constitution of U.N.E.S.C.O. the right of appropriate organs of the latter to admit to membership non-Members of the United Nations is expressly made 'subject to the conditions of the agreement between this Organization and the United Nations'.[2] Whilst the International Civil Aviation Convention merely makes the admission of a certain category of states to the International Civil Aviation Organization 'subject to approval by any general organization',[3] both the agreement between the United Nations and that organization,[4] as well as the agreement between the former and U.N.E.S.C.O.,[5] stipulate for what is in effect a *liberum veto* in the United Nations upon applications for membership of each specialized agency emanating from states belonging to the categories referred to. Such provisions are not usual in the agreements with the specialized agencies. Nor do the constitutions of all the latter concede any control over their membership to the United Nations. Thus, when the constitution of the Universal Postal Union was revised and that organization brought into 'relationship' with the United Nations as a specialized agency, the capacity of the Union to order its own house was left formally intact.[6] But the provisions referred to are of considerable significance in connexion with the present inquiry since they create more precise rights and obligations than the generality of the articles of the agreements with the specialized agencies.

(*g*) *Supplementary agreements with specialized agencies*. Finally, with regard to the agreements with the specialized agencies in general, it may be observed that they each provide that:

> 'The Secretary-General and the [chief officer of the specialized agency concerned] may (are authorised to)[7] enter into such supplementary arrangements for the implementation of this agreement as may be found desirable in the light of the operating experience of the two organisations (as they shall deem necessary in order to carry fully into effect the purposes of this agreement).'[7]

Elsewhere, e.g. with respect to budgetary and financial co-operation and the financing of special services, they contemplate 'arrangements [which] shall be defined in a supplementary agreement between the two organizations'[8] or, more loosely, e.g. in relation to the settlement of disputes with employees, 'cooperat[ion] in the establishment and operation of suitable machinery'.[1] The question arises, with respect to the agreements and joint action envisaged in these provisions, whether the capacity of the United Nations to enter into such agreements or take such action is to be derived from Articles 57 and 63 of the Charter or is part of its inherent treaty-making power arising from its general mandate; whether that capacity resides in the Economic and Social Council subject to the approval of the General Assembly or in the General Assembly alone; and whether it belongs to the Secretary-General exclusively, either in virtue of his office or as a consequence of the conclusion of the principal agreements by the Economic and Social Council and their approval (including approval of provision for supplementary agreements) by the General Assembly. With regard to the capacities of either the Economic and Social Council or the General Assembly in the matter, the question as to whether such supplementary agreements are to be made in virtue of Articles 57 and 63 or in virtue of the residuary treaty-making power of the organization would appear to be immaterial. It may be argued that Articles 57 and 63 merely provide that the specialized agencies shall be '*brought* into relationship', and that this may be achieved by 'agreements defining the terms on which [they] *shall be brought* into relationship' seeing that nothing is said about the amendment of the resultant régime. That thesis is open to the answer that a distinction ought to be drawn between 'supplementary agreements' on the hitherto unresolved subject of budgetary and financial relationships, which would fall within the scope of Articles 57 and 63, and 'supplementary arrangements' for the implementation of the principal agreements, which would not. From the point of view of the Secretary-General, however, the question is of some importance; for he must know when he may act *e proprio vigore* and when not. The view might be taken that he would always be well advised to seek the authority of the General Assembly, but such a view is not necessarily compatible with the status of the Secretariat as a 'principal organ' of the United Nations within the terms of Article 7 (1) of the Charter, nor with the standing of the Secretary-General as an official with independent functions such as those which Article 99 gives him.

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[1] Convention on the Inter-Governmental Maritime Consultative Organization, Arts. 6–8, 57: text in this *Year Book*, 25 (1948), p. 447.

[2] Art. II (2): text in *United Nations Treaty Series*, vol. iv, p. 275; this *Year Book*, 23 (1946), p. 424.

[3] Art. 93: text in *United Nations Treaty Series*, vol. xv, p. 295; see also this *Year Book* (1946), p. 460.

[4] Art. II.

[5] Art. II.

[6] As to the practical result of this disposition with respect to Spain, see this *Year Book*, 25 (1948), p. 461.

[7] The words in round brackets appear in the agreements with the Bank and the Fund.

[8] Cf. also Art. XIII (3) of the agreement with the I.L.O.: 'Arrangements shall be made between the United Nations and the International Labour Organization in regard to the registration and deposit of official documents', implemented by the Memorandum of Agreement Concerning the Procedure to be followed for the Deposit and Registration of International Labour

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Conventions of 17 February 1949 (*United Nations Treaty Series*, vol. xxvi, p. 323), which recites the article in question, is signed by the Assistant Secretary-General in charge of the Legal Department of the United Nations and the Legal Adviser to the International Labour Office, and is expressed to come into effect 'on the approval of the memorandum by the Secretary-General of the United Nations and the Director-General of the International Labour Office'.

[1] Art. 12 of the Statute of the United Nations Administrative Tribunal, adopted by means of Resolution No. 351 (IV) (*United Nations, Official Records of the Fourth Session of the General Assembly, Resolutions*, p. 49), provides, in parallel with the provision quoted above, that 'The competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. . . .'

Actual practice hitherto is not of much assistance in the matter,[1] though it is noteworthy that the extension to officials of various specialized agencies of the liberty to use the United Nations' *laissez-passer*, has been effected by means of instruments styled Supplementary Agreements to the relevant principal agreements, reciting the authorization to the Secretary-General by the Economic and Social Council for their conclusion, operating by means of amendment of the principal agreements, and expressly made subject to approval by the General Assembly. But, as is also recited, the relevant authorization of the Economic and Social Council related specifically to supplementary agreements 'to extend to [the specialized agencies concerned] the provisions of Article VII' of the General Convention on the Privileges and Immunities of the United Nations.[2] And since Section 28 of the Convention contemplates in terms its application in this manner 'if the agreements for relationship made under Article 63 of the Charter so provide',[3] no alternative procedure was possible.

2. *Agreements with respect to privileges and immunities*

(*a*) *The General Convention.* The General Convention on the Privileges and Immunities of the United Nations was referred to expressly by the International Court of Justice, in connexion with the practice of conclusion of treaties by the United Nations and the capacity of that Organization to enjoy rights and obligations under treaty.[4] Probably that instrument illustrates the latter capacity rather than the practice referred to. The United Nations was not itself in fact a contracting party thereto, as Article 105 of the Charter appears neither to recognize nor to permit. This does not mean that the United Nations, *qua* organization, cannot derive rights and obligations from the Convention, nor that the Court was mistaken in declaring that it did in fact do so. The language of Section 35, to which the Court alluded, is not incapable of supporting the construction that the United Nations was actually a contracting party. The same construction can be supported also by the wording of Section 30 which, after laying down that any difference arising out of the interpretation or application of the Convention is to be referred to the International Court of Justice, provides that:

> 'If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.'

It may be said that, if the Convention had been conceived of as operating exclusively between the Members *inter se*, a jurisdictional clause relating to the contentious jurisdiction of the Court could, and should, have been employed instead. On the other hand, it can be argued that the contemplation of disputes between the United Nations and a Member does not necessarily imply that the former is a contracting party to the Convention. Provision for the settlement of such disputes would be equally appropriate if the Organization were merely to enjoy, as it undoubtedly does, rights created by the Convention.

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[1] But see, in addition, *supra*, p. 137, n. 3, and p. 140, n. 8.

[2] See p. 137, n. 3 *supra*.

[3] *United Nations Treaty Series*, vol. i, p. 15.

[4] *Supra*, pp. 110, 113.

However that may be, the General Convention is an instrument exhibiting some marked peculiarities. Thus it has no signatories, the preamble stating that '[T]he General Assembly by a resolution . . . approve[s] the . . . convention and proposes it for accession by each Member of the United Nations'. The Final Article makes provision for such accession to be effected 'by deposit of an instrument' with the Secretary-General. There are indeed precedents for this manner of proceeding. One such is provided by the General Act of Geneva,[1] which was in its turn approved by resolution of the League Assembly and which may perhaps be not improperly described as in some sense standing in a relation to the Covenant similar to that in which the General Convention stands to the Charter. The General Convention is also peculiar in that, although thereby rights are conferred by each contracting state on the United Nations, and on such of the nationals of any other contracting party as may be representatives to or officials of the United Nations,[2] there are also stipulated certain rights and obligations of a non-reciprocal character. Thus each contracting party undertakes to grant the privileges and immunities provided for in general to such of its own nationals as are officials of the United Nations.[3] Various Member states refused to go thus far in the reversal of the so-called 'principle of nationality discrimination' and, in consequence, announced their intention of accepting the convention only subject to reservations.[4] In the case of at least two reservations of this type—those of Canada and New Zealand regarding the retention of the right to impose income-tax upon their own nationals—the instruments of accession to which they were attached were accepted by the depositary as effective. The Secretary-General justified his action in the matter on the ground of the special character of the General Convention, which did not in this regard create reciprocal rights and duties or otherwise incorporate any principle of reciprocity. A further ground of justification adduced was that various states had given notice of their intention to make reservations to the Convention whilst the latter was in process of elaboration and adoption by the General Assembly and its Sixth Committee.[1]

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[1] Hudson, *International Legislation*, vol. iv, p. 2529.

[2] Arts. II–VI.

[3] Art. V. Cf. also s. 30: '. . . the convention shall come into force as regards each Member on the date of deposit of each instrument of accession', and the notation in *United Nations Treaty Series*, vol. i, p. 16: 'Came into force on 17 December 1946 as regards United Kingdom . . . by the deposit of the instrument of accession' (no other state being then a party).

[4] See *United Nations, Official Records of First Part of the First Session of the General Assembly, Sixth Committee*, pp. 26–7 (Ukraine, Byelorussia, U.S.S.R., Australia, Argentina, the United States); see also *Modern Law Review*, 10 (1947), pp. 97, 100.

The matter raises a question of some interest: must a reservation which is proposed whilst a treaty is in process of elaboration within an organ of the United Nations be repeated at some later stage in order to be effective?[2] The answer might depend on whether the treaty in question was one to which the United Nations, as such, was intended to be a party, or merely one proposed for conclusion exclusively between states in pursuance of the general powers of the different organs of the Organization in that regard. With regard to the General Convention itself, whilst it was in process of adoption or approval within the Organization, language was occasionally used which could be taken to imply that the United Nations was, or was intended to be, a contracting party to that instrument. Thus, for instance, the First Report of the Sub-Committee on Privileges and Immunities stated that:

> 'The general Convention on immunities and privileges of the United Nations is, in a sense, a Convention between the United Nations as an organization, on the one part, and each of the Members individually on the other part. The adoption of the Convention by the General Assembly would therefore at one and the same time fix the text of the Convention and also imply the acceptance of that text by the United Nations as a body. . . .'

The same report goes on immediately to observe that:

> 'On the other hand each of the Members individually would only accept and become bound by the Convention when it had deposited the formal instrument of accession or ratification, a step which the Member would only take after it had fulfilled such requirements as its constitution prescribed.'[3]

The obvious implication is that adoption by the General Assembly is to be taken to constitute the definitive assent of the United Nations to the Convention, considered as a treaty between the Organization and each of its Members, whilst the same act involves an acceptance *ad referendum* by the latter. This is a by no means impossible situation if the General Assembly may indeed be viewed in a dual role. It is, first, an organ of an entity having a separate legal personality. 'Secondly, it is a congress of fifty-[nine] individual nations. In its latter capacity it has certain inherent powers which need not be derived from a specific enumeration in the Charter. The Member states when they meet as the General Assembly do not lose the legal capacity which they possess at other times.'[1] On that interpretation the 'reservations' stated by an individual Member in the course of the debates on the General Convention can be looked on as not merely an ineffectual and outvoted effort to interpret the will of the one contracting party, the United Nations, but as an effective expression of the will of the other contracting party, the state Member concerned. Where, however, what is in question is an agreement to which the United Nations is not to be a contracting party, but which its appropriate organ merely commends to its Members, the statement or conduct of one of the latter can have no such dual *legal* quality: it can only constitute a participation in the act of the Organization. In politics, however, as distinct from law, such a 'reservation' may still have a dual quality even in reference to an agreement to which the United Nations is not intended to be a contracting party. For, whilst it will be an element of the corporate act of the Organization, it may also constitute a declaration of policy on the part of the state Member which advances it. Probably the reservations to the General Convention stated in the course of the debate thereon should be construed in this way.[2]

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[1] See *American Journal of International Law*, 44 (1949), p. 123.

[2] See ibid., p. 120.

[3] *United Nations, Official Records of the First Part of the First Session of the General Assembly, Sixth Committee*, Annex 3, paragraph 5.

In relation to the General Convention it is necessary to discuss also the objection to the classification of any agreement evolved in pursuance of Article 105 of the Charter as a treaty on the ground that it can merely 'determine the details of the application' of that article and cannot, therefore, constitute a separate legal act.[3] This interpretation of that provision is to some extent borne out by the reminder of the Executive Committee of the Preparatory Commission to Members of the United Nations that:

> 'Under Article 105 of the Charter, the obligation to accord to the United Nations, its officials and the representatives of its Members all privileges and immunities necessary for the accomplishment of its purposes, operates from the coming into force of the Charter and is therefore applicable even before . . . the Conventions . . . mentioned in paragraph (3) of the Article have been concluded.'[4]

However, the General Convention purports to go somewhat beyond the mere regulation of the details of the obligations of Article 105. Thus its preamble refers specifically to Article 104 also, and Article 1 of the Convention deals with 'juridical personality' [sc. in municipal law], a quality of the United Nations dealt with in Article 104 rather than Article 105, although possibly a 'privilege' which is 'necessary' within the sense of the latter article.[5]

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[1] Sloan, loc. cit., p. 22. The statement cited is, however, qualified in a note by the remark that 'since states must act by representatives a question as to the authority of these representatives does arise'. Compare the case of the 'acceptance' by the World Health Assembly of the United States' reservation to the Constitution of W.H.O., referred to p. 118 *supra*.

[2] See the references given on p. 143, n. 4, *supra*.

[3] See p. 129 *supra*.

[4] *Report*, p. 69.

[5] Cf. the argument of the *Written Statement of the Government of the United Kingdom* anent the attribution to the United Nations of *international* personality as a 'necessary capacity' within

(*b*) *The Headquarters Agreements.* The objection to the treaty-character of the General Convention arising from the relation of that instrument to the obligations of Articles 104 and 105 of the Charter can also be advanced in relation to the two Headquarters Agreements with the United States, a Member of the United Nations.[1] There can be no doubt that the United Nations is a 'contracting' party to the latter: the only question is whether there is any 'contract', given that

> 'throughout its work which resulted in the drafting of the General Convention and of the various draft agreements on the headquarters district, the General Assembly always considered that these two instruments formed an organic whole. . . .'[2]

Also, the definitive Headquarters Agreement contains precise provisions as to its interaction with the General Convention.[3] However, by the same token, the identical arguments against this thesis in relation to the General Convention may be used in defence of the independent character of the rights and obligations recited in the Headquarters Agreements.

(*c*) *The Agreements with Switzerland.* There is apparently no room for that thesis in relation to the two agreements concluded between the United Nations and Switzerland, a non-Member state.[4] By the principal of these agreements, which establishes in Switzerland such a régime as is created with regard to the United Nations in the territory of each of its Members by the General Convention, it is provided that:

> 'The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the organization cannot be sued before the Swiss Courts without its express consent.'[5]

This stipulation is somewhat unusual. It cannot be taken to mean that Switzerland's 'recognition' is 'constitutive' of the United Nations' *international* personality. Nor is it clear at first sight whether the expression 'legal capacity' refers to capacity under international or municipal law; nor yet how immunity from suit can be said, by international law, to follow from the recognition thereof, be it constitutive, or declaratory. If, however,

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Art. 105 (International Court of Justice, *Reparation for Injuries suffered in the Service of the United Nations, Pleadings, Oral Arguments, Documents*, 1949, pp. 23, 34–5).

[1] Agreement regarding the Headquarters of the United Nations, signed at Lake Success on 26 June 1947 (*United Nations Treaty Series*, vol. xi, p. 11); Interim Headquarters Agreement, signed at Lake Success on 18 December 1947 (text published by the United Nations, March 1948).

[2] *Report of the Secretary-General on the* [*Headquarters*] *Agreement*. . . ., United Nations, *Official Records of the Second Session of the General Assembly, Sixth Committee, Summary Records*, Annex II.

[3] S. 26.

[4] Interim Arrangement on privileges and immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council on 1 July 1946 and approved by the General Assembly on 14 December 1946 (*United Nations Treaty Series*, vol. i, p. 168); Agreement on the Ariana Site (of the same date, concluded with the Swiss Confederation acting for the Canton and Town of Geneva) (ibid., vol. i, p. 153).

[5] Interim Arrangement, Art. I. The identical phrase was used in the *modus vivendi* of 18 September 1926 between the League and the Swiss Federal Council (*League of Nations Official Journal*, 1926, p. 1422).

the agreement is merely declaratory of the fact that in international law the United Nations possesses those attributes which the text chooses to describe as 'international personality and legal capacity', then its treaty-character is open to argument on the ground that it creates neither rights nor obligations but merely recites them.[1] However, a very similar expression is used in the Agreement between the Swiss Federal Council and the International Labour Organization concerning the Legal Status of the International Labour Organization in Switzerland.[2] In that instrument, the title of which is significant, the provisions that 'the Swiss Federal Council recognizes the international personality and legal capacity in Switzerland of the International Labour Organization' and that 'the International Labour Organization enjoys the immunities known in international law as diplomatic immunities' seem to have been drawn up with greater precision.[3] For it is clear that what is meant in both these agreements by 'legal capacity' is capacity in municipal law.[4]

V. *Conclusion*

The following propositions are tentatively advanced by way of summary:

1. *The relation of the treaty-making power of the United Nations to the international personality of that organization.* Whilst the international personality of the United Nations is not in question, and has been judicially recognized principally on the evidence of the capacity of that organization to make treaties, such personality is not the source of the treaty-making power of the organization and no conclusions can properly be drawn with respect to its capacity to enter into any particular treaty from the bare fact of its personality.

2. *The nature of the treaty-making power of international organizations in general and of the United Nations in particular.* It must be recognized that the term 'treaty' is not one of exact connotation and that, though there is a general understanding as to the 'law of treaties between States', the

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[1] Compare p. 112 *supra*.

[2] *United Nations Treaty Series*, vol. xv, pp. 377, 383.

[3] Arts. 2, 3. Compare the parallel agreement with the World Health Organization, *United Nations Treaty Series*, vol. xxvi, p. 321.

[4] Counsel for the United Nations relied, before the International Court of Justice, on Art. I of the Interim Arrangement as evidence of the recognition by non-Member states of the *international* legal personality of the Organization (*International Court of Justice, Reparation for Injuries Suffered in the Service of the United Nations, Pleadings, Oral Arguments, Documents*, 1949, pp. 70, 74); cf. also *Statement by M. Kaeckenbeeck* (Belgium) (ibid., pp. 94, 97). But this reliance was associated with a like construction of Art. 104 of the Charter (ibid., pp. 72, 94–6). As to the latter, the better view appears to be that '. . . Article 104 is neutral on the question of the international personality of the Organization. It does not establish this personality, but neither need it be regarded by any process of negative implication as ruling it out' (*Statement by Mr. Fitzmaurice* (United Kingdom), ibid., pp. 110, 118). As, however, Art. 104 of the Charter at least constitutes an obligation by Members to create or recognize a *municipal* legal personality in connexion with the Organization within their respective territories, as is universally conceded, the Interim Arrangement must do the same as regards Switzerland, and its treaty character is not therefore to be disputed.

generally accepted rules applicable to such treaties are not necessarily applicable to the agreements of international organizations, either because of the essential nature of such organizations or because of the special purposes for which they are endowed with such capacities as they possess, including the capacity to make treaties. This is especially the case with respect to the binding force of treaties entered into on behalf of, or on purported behalf of, international organizations in the absence of compliance with constitutional requirements.

3. *The extent of the treaty-making power of the United Nations: The Charter.* Given a somewhat extended definition of what constitutes 'treaty-making', there are four main provisions, or groups of provisions, in the Charter of the United Nations which may be relied upon as evidence of the treaty-making power of that organization:

(*a*) Article 43 relating to agreements making available military forces and facilities to the Security Council;
(*b*) Chapter XII relating to the trusteeship agreements;
(*c*) Articles 57 and 63 relating to agreements bringing the specialized agencies into relationship with the United Nations;
(*d*) Article 105 relating to conventions applying the principles laid down in the Charter as to the privileges and immunities of the United Nations.

From the point of view of what may be called the traditional law of treaties, there can be advanced with respect to the bi- or multi-lateral arrangements contemplated by each one of these stipulations various objections to their designation as 'treaties', or as treaties to which the United Nations is a contracting party. Nevertheless, notwithstanding that the United Nations possesses also an 'inherent treaty-making power', the stipulations referred to stand in some contrast to others, which appear in other parts of the Charter and which are incapable of sustaining the interpretation that they contemplate or authorize the conclusion of treaties by the Organization.

4. *The practice of the United Nations.* The practice of the United Nations reveals that there have been concluded various classes of arrangements which may be relied upon equally in support of the proposition that the Organization has a treaty-making power. These are principally:

(*a*) the so-called trusteeship agreements;
(*b*) agreements with the specialized agencies;
(*c*) agreements with international organizations other than the specialized agencies;
(*d*) agreements concerning the privileges and immunities of the Organization; and
(*e*) certain other agreements.

The same practice confirms the 'inherent treaty-making power' of the United Nations as much as its power under the Charter to make treaties. It likewise bears out the distinction, apparent in the Charter, between the treaty-making capacity or function of the United Nations and its function of serving as a device for the elaboration of the texts of treaties to be applied exclusively between states.

Every instance in practice of the exercise of what is here described as the treaty-making power of the United Nations is open to the objection that it does not exactly conform to the traditional law of treaties between states. But the question may, after all, be one of words only. The 'classical' concept and form of the treaty have developed as a result of the continuous influence of the chanceries of a few states, and notably of Britain and France. They have served their purpose well. They are in a stage of continuous change and development. Thus of the great instruments which have during the past decade established or re-established the imposing array of what are now called the specialized agencies, it is probably true to say that not one of them is designated a 'treaty' and that, though they all stipulate for a process in the nature of 'ratification', not one of them employs that term. Now that this network of international organizations has in fact come into existence, other developments of varying significance in the law of treaties must naturally follow.

THE ORGANIZATION OF AMERICAN STATES AND THE COUNCIL OF EUROPE

A COMPARATIVE STUDY

By PROFESSOR M. MARGARET BALL

AT the Ninth International Conference of American States (Bogotá, 30 March–2 May 1948), the twenty-one American Republics signed the Charter of the Organization of American States (O.A.S.).[1] This document represents the high point of the constitutional development of an organization which has been evolving steadily since 1890. A year later, on 5 May 1949, ten nations of Western Europe signed, in London, the Statute of the Council of Europe,[2] thereby creating a new regional organization the possibilities for future development of which may prove to be considerable, although the direction of that development is as yet uncertain. In view of the differences in origin, ultimate objectives, general character, structure, and functions of the two organizations, doubt might well be expressed as to the value of any attempt at comparison. Since, however, regional organization is playing an increasingly important role within the framework of the United Nations Charter, and since the two organizations under consideration are among the most important in existence to-day, a parallel study would appear to be of some interest—the more so, perhaps, because the two are attempting to solve somewhat similar problems in a democratic way.

It should be stated at the outset that this article does not aspire to a definitive analysis of all aspects of both systems. Still less does it propose to argue the general proposition of the place of regional organizations in a world in which peace remains indivisible and the ramifications of economic problems tend to be universal. Furthermore, no attempt will be made to compare the two organizations in question with other regional groups. What it is proposed to do here is to examine the juridical bases of the O.A.S. and the Council of Europe, to compare their structure and to analyse the scope of their respective functions.

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[1] The text is printed in full in *Ninth International Conference of American States; Report of the Delegation of the United States of America with Related Documents* (1949), pp. 166–86 (Department of State Publication 3263); hereinafter cited as: *Ninth Conference, Report of American Delegation.*

[2] Text: *Statute of the Council of Europe* (1949), Cmd. 7686. Signatories: Belgium, Denmark, France, Irish Republic, Italy, Luxembourg, Netherlands, Norway, Sweden, United Kingdom. Turkey, Greece, and Iceland were invited by the Committee of Ministers to join the Council, 8 August 1949. Turkey and Greece participated in the first session of the Consultative Assembly. The Icelandic Government was not in a position to accept membership at the time for the reason that its Parliament was not sitting and could therefore not approve accession to the Statute. On 15 January 1950 Iceland was still outside the Council.

I

The O.A.S. and the Council of Europe reflect, not unnaturally, the circumstances of their origins. The strength of outside pressures, the seriousness of internal economic problems, the prior establishment of other organizations, and differences in relative power of the Member (or potential Member) states, have been among the most important elements affecting the development of the two organizations. To some extent, the imprint of these factors may be discerned in their basic instruments.

The relative distance of the American Republics from the more troubled area of Europe permitted the O.A.S. to evolve at a dignified, and frequently halting, pace. While the threat of a Spanish attempt to regain lost colonies had led to a number of conferences among Latin-American states in the nineteenth century, that threat had passed by 1889, when the first Pan-American conference was convoked at Washington. There was, moreover, no great economic pressure for inter-American co-operation before 1929. The earlier activities of the Organization could thus be confined largely to commercial and technical co-operation, without necessity of elaborating machinery to deal with either security or important economic policy problems. It is noteworthy that the O.A.S. did not attempt to deal with major matters of economic policy until the depression period. It is even more significant that the groundwork for consultation on security problems was not laid until the Second World War was imminent, that no attempt was made to provide sanctions for the system until that war was drawing to a close, and that sanctions were not made a permanent part of the system until the Inter-American Treaty of Reciprocal Assistance was signed at Rio de Janeiro in 1947.[1]

Outside pressures have therefore influenced the development of inter-American institutions, but their virtual absence in the beginning permitted a slow, rather haphazard growth, while increasing pressures at a later date were largely responsible for the extension and consolidation of the system which was carried out at the Mexico City,[2] Rio, and Bogotá Conferences. More important here, however, is the fact that these pressures are still so weak that the American Republics have felt no desire to transform the inter-American system into anything approaching a federation. A strong sense of the importance of national sovereignty and independence has, of course, also been a factor here.

In contrast, it is largely owing to the existence of much greater outside pressures than those to which the American Republics have ever been subjected which, together with the seriousness of the economic problem after the Second World War, led to the establishment of the Council of Europe in the amazingly short period between Mr. Bevin's rather ambiguous call for 'western union', on 22 January 1948,[1] and the signature of the Statute of the Council on 5 May 1949.[2] It is also the existence of these political pressures and economic problems, and the conviction on the part of many (and particularly the powerful European Movement) that the pressures can only be successfully resisted and the problems solved through the creation of a European 'union', which has resulted in the establishment of an international body which departs in important ways from the more accustomed patterns of international organizations.

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[1] Text: *Inter-American Conference for the Maintenance of Continental Peace and Security, Quitandinha, Brazil, August 15–September 2, 1947; Report of the Delegation of the United States of America* (1948), pp. 59–65 (Department of State Publication 3016); hereinafter cited as *Rio Conference, Report of American Delegation.*

[2] Inter-American Conference on Problems of War and Peace, 1945.

In the course of its evolution, the inter-American system came to include a great many specialized organizations of one kind or another which had no definite relationship to the Pan-American Union or to each other. Since most of these had been created by the Conferences of American States, however, the Bogotá Conference was faced with no insuperable problem in providing a recognized place for them within the O.A.S. It has therefore been possible to create, within a single framework, an organization which functions in the security, economic, social, and cultural fields. In contrast, the prior establishment of the organs set up under the Brussels Treaty, the prior creation of the Organization for European Economic Co-operation (O.E.E.C.), and the virtually concurrent signature of the Atlantic Treaty, have meant limitations upon the jurisdiction of the Council of Europe. This, in turn, has meant that the regional organization of Western (i.e. non-Communist) Europe is not self-contained and, in the security field, must be regarded as complemented only by organs which are outside the system, namely, those provided by the Atlantic Pact. It must be recalled in this latter connexion, of course, that Ireland, Sweden, Turkey, and Greece, all of whom are members of the Council of Europe, are not signatories of the Pact.[3]

Differences in the respective power positions of Member or potential Member states have not been a serious problem in constructing the Council of Europe, although the future position of Germany with respect to it has caused serious concern, especially in France. The most urgent problem for the Council has been the compatibility of the British Commonwealth with the type of European union which some of the components of the European Movement would like to see evolve out of the present structure. Differences in power of the Member states have, however, directly affected the development of the organs of the O.A.S. The strength of the United States as compared with that of the several other members of the O.A.S. has made it exceedingly difficult to provide the latter with a permanent body empowered to deal with political problems. For a very long time it resulted in the virtual absence of such a body and, as will be noted below, the Charter adopted at Bogotá still limits the powers of the Council of the Organization in the political field. Moreover, it is this difference in power which has been in part responsible for the fact that the O.A.S. has been given not one, but three, important instruments of a constitutional character—in contrast to the single Statute of the Council of Europe.

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[1] *House of Commons Debates*, 5th series, vol. 446, pp. 383–409.

[2] On the role of the European Movement in the establishment of the Council of Europe, see European Movement, *European Movement and the Council of Europe* (1949).

[3] Signatories of the Atlantic Pact which are not members of the Council of Europe are Canada, Iceland, Portugal, and the United States. The following are both Members of the Council of Europe and signatories of the Atlantic Pact: Belgium, Denmark, France, Italy, Luxembourg, Netherlands, Norway, and the United Kingdom.

The three basic documents of the O.A.S. to which reference is made are: the Charter; the Pact of Bogotá,[1] which outlines procedures for the pacific settlement of disputes; and the Rio Treaty, which indicates the steps to be taken in the event of aggression or threat of aggression. The question whether the Charter should be drafted as an all-inclusive document or should deal only with matters relating to the structure of the O.A.S. and the general functions and relationships of its organs was discussed at Bogotá,[2] but the final decisions were substantially in the latter sense. The Charter incorporates the Rio Treaty by reference in Article 25 and elsewhere, but does not repeat its detailed provisions.[3] The Charter also lays down the obligation of pacific settlement, but it specifies in Article 23 that the procedures for settlement shall be set forth in a separate treaty.[4] Three separate instruments must therefore be taken into consideration. But to make even this statement is to be guilty of over-simplification. The juridical position is actually a good deal more complicated than it would seem to imply, and can probably best be explained by a brief historical reference.

The Pan-American Union operated until 1928 under resolutions of the International Conferences of American States. At the Sixth Conference, in 1928, however, a Convention was drafted which was to provide a constitution for the organization.[5] Recognizing that there might be considerable delay in ratification, the Conference at the same time passed a Resolution which embodied the most important points of the Convention.[6] Since the Convention never received more than sixteen of the necessary twenty-one ratifications,[1] the Pan-American Union continued to function in accordance with conference resolutions until the Charter was signed at Bogotá in 1948. The Charter, departing from the earlier requirement of unanimous ratification, provides that it shall go into effect as between ratifying states upon ratification by two-thirds of the signatories, or fourteen of the American Republics.[2] In the light of past experience, and considering it 'desirable to establish a procedure for the functioning of the Organs of the Organization of American States similar to that established in its Charter, to be effective on an interim basis until the said Charter enters into force', the Bogotá Conference resolved, in addition, however, that organs of the system already in existence should 'immediately adopt the nomenclature and provisions established in the Charter of the Organisation of American States'. New organs provided for in the Charter were to be established provisionally.[3] Since only Costa Rica, Mexico, and the Dominican Republic have ratified the Charter thus far,[4] the somewhat anomalous situation in which the substance of the Charter is put into effect by resolution rather than ratification may continue for some little time, and possibly indefinitely.

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[1] Text: *Ninth Conference, Report of American Delegation*, pp. 186–201.

[2] See ibid., p. 13.

[3] Art. 25: 'If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extra-continental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defence, shall apply the measures and procedures established in the special treaties on the subject.'

[4] Art. 23: 'A special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application, so that no dispute between American States shall fail of definitive settlement within a reasonable period.'

[5] Text: *The International Conferences of American States, 1889–1928* (1931), pp. 398–403.

[6] Resolution on the Pan-American Union (ibid., pp. 397–8).

The Rio Treaty, on the other hand, has been ratified by sixteen states and is now in effect.[5] The third instrument, the Pact of Bogotá, was signed by all twenty-one states, but seven signed with reservations.[6] Only two states, Costa Rica and Mexico, have ratified.[7] The Pact is to go into effect as between the ratifying states upon ratification, and is to supersede as between such ratifying states all of the treaties relating to pacific settlement concluded in preceding years within the inter-American system.[8] It was

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[1] Pan-American Union, Division of Legal Affairs, *Status of the Pan-American Treaties and Conventions* (Revised to 1 July 1949) (1949), p. 3.

[2] Art. 109.

[3] Ninth International Conference of American States, *Final Act*, Resolution XL. The Final Act is reprinted in full in *Ninth Conference, Report of American Delegation*, pp. 222–76.

[4] *Status of the Pan-American Treaties and Conventions*, p. 9. Brazil is reported to have ratified the instrument, but the ratification has not yet been deposited. It has been suggested that some of the other Republics are waiting for the United States to ratify, and it is hoped that the Senate will approve the Charter during the present session.

[5] Of the sixteen ratifying states, Honduras and Nicaragua made reservations. Argentina, Bolivia, Guatemala, and Peru signed, but have not yet ratified the Treaty. Ecuador has not signed (ibid., p. 8).

[6] Argentina, Bolivia, Ecuador, United States, Nicaragua, Paraguay, and Peru (ibid., p. 9).

[7] Ibid.

[8] Pact of Bogotá, Art. 58. The instruments to be superseded are:

Treaty to Avoid or Prevent Conflicts between the American States, of 3 May 1923;
General Convention of Inter-American Conciliation, of 5 January 1929;
General Treaty of Inter-American Arbitration and Additional Protocol of Progressive Arbitration, of 5 January 1929;
Additional Protocol to the General Convention of Inter-American Conciliation, of 26 December 1933;
Anti-War Treaty of Non-Aggression and Conciliation, of 10 October 1933;

hoped that the drafting of a single, inclusive, treaty on pacific settlement might end the chaos which had hitherto existed—occasioned by the large number of poorly ratified peace instruments. Until all of the Governments have ratified the Pact, however, there will continue to be confusion within the inter-American arrangements for pacific settlement, and there will continue to remain the problem of finding an instrument which is binding on any two parties in the event of a dispute between them.

In addition to the foregoing, the constitutional network of the O.A.S. includes conventions and resolutions establishing specialized agencies, and agreements bringing specialized agencies into formal relationship with the Organization.[1]

Compared with the above, the juridical basis of the Council of Europe is simple. There is a single instrument, the Statute, ratified by all signatories and in effect. But if the constitution of the Council of Europe is a perfectly clear-cut document in itself, that does not, of course, mean that the organization of Western Europe is uncomplicated, since Western Europe is also organized as O.E.E.C.,[2] to say nothing of smaller sub-regional groups created for special purposes, such as the organization of the Brussels Treaty Powers, Benelux, &c. One is almost inclined to suggest that if the juridical complexity of the O.A.S. reflects, as it does, both its years of growth and the distrusts which occasionally plague its members in their relations with each other, the apparent simplicity of the juridical structure of Western Europe as seen in the Statute of the Council of Europe is largely the result of the latter's more recent origin, the desire of certain Member Governments to move slowly along the road to greater European unity, and of prior commitments of Member Governments to other organizations. There is reason to believe, from the recommendations made at the first session of the Consultative Assembly, from the recommendations made to the Assembly by its Economic Committee in December 1949,[3] and from the pressure exercised by the European Movement, that

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Convention to Coordinate, Extend and Assure the Fulfilment of the Existing Treaties between the American States, of 23 December 1936;

Inter-American Treaty on Good Offices and Mediation, of 23 December 1936;

Treaty on the Prevention of Controversies, of 23 December 1936.

Texts of these documents may be found in convenient form in *Eighth International Conference of American States; Special Handbook for the Use of Delegates* (1938), pp. 141 ff.

[1] The first agreement of the latter type was that concluded between the O.A.S. and the Pan-American Institute of Geography and History. Its text is reproduced in the *Inter-American Juridical Yearbook* (1949), pp. 139–41.

[2] All of the members of the Council of Europe are also members of O.E.E.C. The latter also includes, however, Iceland, Portugal, Switzerland, Austria, the U.S.-U.K. Zone of Trieste, and Western Germany.

[3] See below, pp. 160–1. See also the recommendation for the establishment of industrial Standing Committees contained in the interim report on commercial policy (Council of Europe, Consultative Assembly, AS/EC [49] 18, 'Commercial Policy; Motion adopted by the Committee on Economic Questions . . . 17th December, 1949', p. 2), and the recommendation for the creation of a European Agreements Committee contained in the interim report on cartels

the Statute of the Council will prove in the long run to be a point of departure for a more complex structure than at present exists, rather than a final formulation of a set of fixed legal relationships. It is pertinent to note, in this connexion, that although the British Government had made it unequivocally clear that it was not prepared to accept the idea of European federation, the Consultative Assembly, at its 1949 session, adopted a statement that 'the Assembly considers that the aim and goal of the Council of Europe is the creation of a European political authority with limited functions but real powers'.[1]

The O.A.S. has been rather more explicit about its relationship to the United Nations than has the Council of Europe. As early as the Mexico City Conference in 1945, it was specified that the Declaration and Recommendation which comprised the substance of the Act of Chapultepec

> 'constitute a regional arrangement for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action in this Hemisphere. The said arrangement, and the pertinent activities and procedures, shall be consistent with the purposes and principles of the general international organization [United Nations], when established.'[2]

The Rio Treaty was drafted in the same spirit, with particular reference to Article 51 of the United Nations Charter and in full accord with the provisions of Articles 51 to 54 of that document. The Pact of Bogotá also was drafted with reference to the United Nations Charter. The most explicit statement of all, however, is found in Article 1 of the Charter of the O.A.S.: 'Within the United Nations, the Organisation of American States is a regional agency.'[3]

The Statute of the Council of Europe is more sparing in its reference to the United Nations, and contents itself with the statement that: 'Participation in the Council of Europe shall not affect the collaboration of its Members in the work of the United Nations and of other international organisations or unions to which they are parties.'[4] It has been generally

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(AS/EC [49] 14, 'Control of Cartels; Interim report adopted by the Committee on Economic Questions . . . during its session of 15th–16th December 1949', pp. 1–2).

[1] Council of Europe, Consultative Assembly, Ordinary Session 1949, Doc. No. 87, 'Recommendations to the Committee of Ministers Adopted 6th September 1949 on . . . Consideration of any necessary changes in the political structure of Europe to achieve a greater unity between the Members of the Council of Europe and to make an effective European co-operation in the various spheres specified in Article 1 of the Statute', Part iv, point 8.

[2] *Final Act of the Inter-American Conference on Problems of War and Peace* (1945), Resolution VIII, Part III. The text may also be found in *Documents on American Foreign Relations*, vol. vii (1944–5), pp. 717–20.

[3] Art. 102 states that the provisions of the Charter shall not 'be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations', and Art. 110 provides for the registration of the Charter with the United Nations Secretariat.

[4] Art. 1 (*c*), the *Explanatory Note on the Provisions of the Statute of the Council of Europe*, 21 June 1949 (1949), Cmd. 7720, p. 3, states simply: 'The new organisation is not intended to replace, but to supplement, the work of the United Nations. Special provision is made in Article 23 (*b*) to ensure that so far as possible there shall not be overlapping and duplication with the

assumed, however, that it was intended to create a regional organization under the United Nations, and that that, in effect, is what has been created. Mr. Churchill's statement before the Consultative Assembly, 17 August 1949, confirms this view. He said:

> 'We are engaged in the process of creating a European unit in the world organisation of UNO. . . .
>
> 'We are not in any way the rival of the world organisation. We are a subordinate but essential element in its ultimate structure.'[1]

Neither regional organization constitutes a completely closed system as far as membership is concerned. The O.A.S. leaves the way open to eventual Canadian membership by providing, in Article 2, that 'All American States that ratify the present Charter are Members of the Organization'. This same provision would make it possible for any new states which might come into being in the Western Hemisphere to become Members. There is no provision for extending invitations to membership, but such an invitation would undoubtedly be a first step toward the admission of new Members. There is only one type of membership. There are no provisions for suspension or expulsion. The Statute of the Council of Europe, on the other hand, stipulates in Article 3 that Members

> 'must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I'.

Any European state which meets these requirements may be invited to accept membership by a two-thirds majority of the total membership of the Committee of Ministers.[2] In special circumstances, European states fulfilling the above prerequisites may be invited by a similar majority to become Associate Members. This type of membership, intended for occupied countries, carries with it representation in the Consultative Assembly only.[3] Any state which seriously violates Article 3 of the Statute may be suspended, and invited to withdraw from the Council; it may be expelled by the Committee of Ministers if it fails to withdraw upon invitation.[4] States in arrears as to financial contributions may be suspended by the Committee of Ministers until their obligations have been met.[5]

Both regional organizations provide for voluntary withdrawal. Members may withdraw from the O.A.S. on two years' notice, having fulfilled all of

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work of existing organisations, more particularly the Organisation for European Economic Co-operation.' There is no reference in the Statute to registration with the United Nations Secretariat, but it seems to have been assumed that this would follow from the provisions of the United Nations Charter itself.

[1] Council of Europe, Consultative Assembly, Ordinary Session 1949, AS/CR/6, *Official Report* (Provisional), Sixth Sitting, Wednesday, 17 August 1949, p. 56.

[2] Statute, Arts. 4 and 20 (*c*). Note that Turkey is considered a European state for purposes of the Statute.

[3] Ibid., Arts. 5 and 20 (*c*).

[4] Arts. 7 and 8.

[5] Art. 9.

their obligations under the Charter.[1] Members may withdraw from the Council of Europe at the end of any financial year, provided that notification is given at least three months before that time.[2]

Neither Charter nor Statute is regarded as an unalterable document. The Charter may be amended only by a special conference, and amendments are to enter into force when ratified by two-thirds of the signatories to the Charter.[3] The amending process included in the Statute of the Council of Europe is much more complex than that of the Charter of the O.A.S., and is apparently designed to give flexibility to the organization while safeguarding the right of the individual Member Governments to control its essential character. Amendments are normally proposed by the Committee of Ministers, but, in certain circumstances, may also be proposed by the Consultative Assembly.[4] Amendments proposed by the Committee of Ministers require a unanimous vote of the representatives voting and of a majority of the total membership of the Committee, if they relate to the articles excluding national defence questions from the jurisdiction of the Council, to withdrawal from the Council, to the nature of the action to be taken by the Committee of Ministers (i.e. conventions and recommendations), to voting provisions for the Committee of Ministers, or to the advisory character of the Consultative Assembly[5]—that is, to those articles which define the organic nature of the Council. Amendments to other articles may be proposed by a two-thirds majority of the representatives voting, provided that these constitute an absolute majority of the membership of the Committee.[6] Amendments, whether proposed by the Committee of Ministers or by the Consultative Assembly, must be embodied in a Protocol and ratified by two-thirds of the Member Governments before going into effect.[7] Despite the foregoing, amendments to Articles 23–35 (dealing with the scope of Assembly discussion, representation in the Assembly, and its procedure), 38 and 39 (finance) may be made without ratification after having been accepted by both the Committee of Ministers and the Consultative Assembly. This latter provision, however, is not to go into effect until the end of the Assembly's second session.[1]

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[1] Charter of the O.A.S., Art. 112.

[2] If notice is not given during the first nine months of the financial year, it is effective only at the end of the next financial year (Art. 7 of the Statute).

[3] Charter, Arts. 111 and 109.

[4] Art. 41 (*a*) of the Statute permits the Consultative Assembly to propose amendments 'in the conditions provided for in Article 23 . . .'.

Art. 23 provides:

'(*a*) The Consultative Assembly shall discuss, and may make recommendations upon, any matter within the aim and scope of the Council of Europe as defined in Chapter I, which (i) is referred to it by the Committee of Ministers with a request for its opinion, or (ii) has been approved by the Committee for inclusion in the Agenda of the Assembly on the proposal of the latter.'

'(*c*) The President of the Assembly shall decide, in case of doubt, whether any question raised in the course of the Session is within the Agenda of the Assembly approved under (*a*) above.'

[5] Art. 20 (*a*) (v). The articles for the proposed amendment of which unanimous consent is required as indicated are: 1 (*d*), 7, 15, 20, and 22.

[6] Art. 20 (*d*).

[7] Art. 41 (*b*), (*c*).

It is apparent from the above that two-thirds of the Member Governments could modify much of the Statute; it is equally evident that the Statute cannot be transformed into the constitution of a European federation without the assent (tacit or expressed) of all the Member Governments. In contrast, there is no provision of the Charter of the O.A.S. which could not be changed with the assent of two-thirds of the Member Governments, leaving dissenters with only the alternative of withdrawal from the Organization. The point is, of course, that there is no desire in the Western Hemisphere to change the character of the Organization, whereas the nature of the organization of Western Europe is a matter on which there is division of opinion.

II

The structure of the O.A.S. is more complex than that of the newer Council of Europe. As now organized, the O.A.S. operates through the Inter-American Conference, the Meeting of Consultation of Ministers of Foreign Affairs, the Council, the Pan-American Union, the Specialized Conferences, and the Specialized Organizations.[2] The Inter-American Conference meets regularly, is the 'supreme organ' of the O.A.S., and is its principal policy-determining agency.[3] The Meeting of Consultation of Ministers of Foreign Affairs meets irregularly on decision of a majority of the American Governments to deal with urgent matters and to determine the steps to be taken under the Rio Treaty in the event of aggression or threat of aggression.[4] It is advised on military matters by an Advisory Defence Committee.[5] The Council is the permanent 'executive' organ of the O.A.S. as a whole. Successor to the former Governing Board, the Council also supervises the Pan-American Union. It is empowered under the Charter and the Rio Treaty to act in emergency situations pending the convocation of a Meeting of Consultation.[6] It has three 'organs', or semi-autonomous subsidiaries, namely, the Inter-American Economic and Social Council, the Inter-American Council of Jurists, and the Inter-American Cultural Council.[7] The Pan-American Union is the general secretariat of the O.A.S.[1] The Specialized Conferences are numerous and varied; they are technical in nature.[2] The Specialized Organizations are defined in the Charter as 'intergovernmental organisations established by multilateral agreements and having special functions with respect to technical matters of common interest to the American States'.[3]

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[1] Art. 41 (*d*).

[2] Charter, Art. 32.

[3] Ibid., Art. 33. The Inter-American Conference replaces the former International Conferences of American States (usually called the Pan-American Conferences), as well as the special conferences held outside the regular series, namely, the Inter-American Conference on Conciliation and Arbitration (Washington, 1929), the Conference for the Maintenance of Peace (Buenos Aires, 1936), the Conference on Problems of War and Peace (Mexico City, 1945) and the Conference for the Maintenance of Continental Peace and Security (Rio de Janeiro, 1947).

[4] Charter, Arts. 39 and 40; Rio Treaty, Art. 11.

[5] Charter, Art. 44.

[6] Charter, Arts. 50–4; Rio Treaty, Art. 12.

[7] Charter, Art. 57. These organs advise the Council and render technical services to the Governments on request.

In contrast to the above, the Council of Europe consists of only three organs: the Committee of Ministers, the Consultative Assembly, and the Secretariat. The Committee of Ministers 'is the organ which acts on behalf of the Council of Europe . . . '.[4] It may make recommendations to the Governments, and is to 'consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by Governments of a common policy with regard to particular matters'.[5] The Consultative Assembly 'is the deliberative organ of the Council of Europe'. Its role is limited to the discussion of matters within its competence and the making of recommendations to the Committee of Ministers.[6] The Secretariat services the other organs of the Council.

Unlike the O.A.S., the Council of Europe as yet contains neither specialized conferences nor specialized agencies. While the view was expressed at the first session of the Consultative Assembly that it would be desirable to place O.E.E.C. under the Council, the report of the Economic Committee did not call for such a step. Proposals for the creation of a European Reserve Bank and a European Bank for Investments were referred by the Assembly to the Finance and Currency Sub-Committees of the Economic Committee for study and report at a later date.[7] The Assembly did recommend that the Committee of Ministers establish a European Cultural Centre,[8] but no action has yet been taken on this proposal. At its meeting of December 1949, the Economic Committee, in a series of interim reports, recommended to the Consultative Assembly the establishment of several new bodies, including a Public Steel Organization and a European Monetary (Stabilization) Fund.[9] If positive action is taken on some of the foregoing proposals, the Council of Europe will evidently cease to lack specialized agencies.

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[1] Charter, Art. 78.

[2] Arts. 93 and 94 of the Charter. These conferences include such regular series as the Sanitary, Scientific, and Commercial Conferences, as well as many others.

[3] Charter, Art. 95.

[4] Statute, Art. 13.

[5] Ibid., Art. 15.

[6] Ibid., Art. 22.

[7] Council of Europe, Consultative Assembly, Ordinary Session 1949, Doc. No. 71, 'Recommendations to the Committee of Ministers Adopted 5th September 1949 on the conclusion of the debate on the role of the Council of Europe in the economic field', p. 5 (Appendix).

[8] Ibid., Doc. No. 101, 'Recommendations to the Committee of Ministers Adopted 7th September 1949, on the conclusion of the debates on . . . Methods by which the Council of Europe can develop cultural cooperation between its Members', pp. 4–5.

[9] Council of Europe, Consultative Assembly, AS/EC (49) 15, 'Steel Production; Interim Report adopted by the Committee on Economic Questions . . . during its session of 15th–16th December 1949', pp. 2–3; AS/EC (49) 12, 'Resolution on European Monetary Reform adopted by the Committee on Economic Questions . . . during its Session December 15th–16th, 1949', pp. 5, 8.

As regards the principal organs of the two organizations (i.e. Conferences, Meetings of Consultation and Council of the O.A.S., and Committee of Ministers and Consultative Assembly of the Council of Europe), it is the Committee of Ministers of the Council which bears a resemblance to the organs of the O.A.S. This is immediately apparent from a glance at the bases of representation in these organs, and the kind of action which they are entitled to take. In the Conference, the Meeting of Consultation, and the Council of the O.A.S., as in the Committee of Ministers of the Council of Europe, each Member is represented by an officially appointed and instructed delegation or delegate. In the case of the Meeting of Consultation and the Committee of Ministers, the delegate is the Minister of Foreign Affairs or his substitute.[1] In all four organs, all Members have an equal voice, in conformity with the long tradition of international conferences. The activities of the three organs of the O.A.S. mentioned, and of the Committee of Ministers, are therefore completely subject to Member Government control. It is important to note that these are the four major organs of the two systems which are entitled to draft conventions or other agreements, and to make recommendations directly to the Governments.

The four organs do not have equal powers with respect to the drafting of agreements. The Inter-American Conference and the Meeting of Consultation may draft and sign treaties and other agreements, subject only to the limitations of the agenda and the instructions of the several delegations; these documents are, of course, subject to ratification. The Statute of the Council of Europe authorizes the Committee of Ministers to recommend the conclusion of conventions and other agreements to the Governments; it does not empower the Committee itself to conclude agreements.[2] However, the Committee is composed of Foreign Ministers or their alternates; the power to recommend the conclusion of a convention does carry with it the power to draft a recommended text; and the Governments may well find it convenient to authorize the signature of such agreements at meetings of the Committee of Ministers. In most cases, the agreements would presumably be subject to ratification. In view of these facts, there would seem to be little substantial difference between the powers of the Committee of Ministers and the powers of the Inter-American Conference or the Meeting of Consultation in this respect. (In this connexion it may be of interest to note that the powers of the Inter-American Conference and of the Meeting of Consultation to draft and sign conventions derive not from the text of the Charter but from established practice.) The powers of the Council of the O.A.S. are more limited. The Council may conclude certain agreements on behalf of the O.A.S. under Article 53 of the Charter, and may draft treaties or conventions on instruction of the Inter-American Conference or the Meeting of Consultation for the subsequent consideration of the latter bodies, as was done in preparing the Charter of the Organization.

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[1] Charter, Art. 42; Statute, Art. 14.

[2] Art. 15 of the Statute:

'(*a*) On the recommendation of the Consultative Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by Governments of a common policy with regard to particular matters. Its conclusions shall be communicated to members by the Secretary-General.

'(*b*) In appropriate cases, the conclusions of the Committee may take the form of recommendations to the Governments of Members, and the Committee may request the Governments of Members to inform it of the action taken by them with regard to such recommendations.'

There is no general advisory body in the O.A.S. There is no parallel to the Consultative Assembly of the Council of Europe, with its uninstructed delegations designated as each Government may decide, individual voting,[1] and representation based roughly on the size of population of the respective Member states.[2] There is no organ of the O.A.S. composed exclusively of the Members of Parliament of the Member states.[3] There is no pressure group operating with respect to the O.A.S. which bears the remotest similarity to the European Movement. It is unnecessary to labour the point that the type of representation adopted for the Consultative Assembly was made possible by the fact that the Assembly's formal powers are very limited. It has no authority to draft conventions or to make recommendations directly to the Governments. It can, of course, bring important matters before world opinion, and it can obtain and publish information—in both ways exercising a far from negligible influence upon the course of government policy.

The differences in the structure of the two regional organizations are emphasized further both by the frequency of the meetings of the Consultative Assembly, as contrasted with the Inter-American Conference, and by the functions of their respective committees. The Inter-American Conference meets normally at five-year intervals, although special conferences may be held by decision of two-thirds of the Member Governments.[1] The Consultative Assembly, on the other hand, meets annually,[2] and special sessions may be convoked by the Committee of Ministers.[3] The advisory nature of the Consultative Assembly, and its function in mobilizing public opinion, as opposed to the Inter-American Conference function of drafting recommendations and conventions, probably explain this difference in frequency.

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[1] While the principle of equality of representation and voting of Member states holds for the Inter-American Conference, the principle of individual voting was carried over by the 1949 Consultative Assembly into its committee system. For convenience, however, a fixed—but not an equal—number of seats on each committee was allocated to the delegates from each Member state. The Committee on General Affairs, the Economic Committee, and the Committee on Legal and Administrative Questions each had 23 members; these were allocated as follows: 3 each to the United Kingdom, France, and Italy; 2 each to Sweden, Greece, Turkey, Belgium, and Holland; 1 each to the remaining countries. The Committee on Social Questions, the Committee on Cultural and Scientific Questions, and the Committee on Rules of Procedure, were each composed of 18 members; on these Committees, the United Kingdom, France, and Italy each had 3 representatives, and all of the other Members had 1 each (Council of Europe, Consultative Assembly, Ordinary Session 1949, AS/CR/7, *Official Report* [Provisional], Seventh Sitting, Thursday, 18 August 1948, pp. 56–7).

[2] See Arts. 25 and 26 of the Statute. Representation accorded original members: Belgium 6, Denmark 4, France 18, Irish Republic 4, Italy 18, Luxembourg 3, Netherlands 6, Norway 4, Sweden 6, United Kingdom 18.

[3] This is not required under the Statute (Art. 25), but is likely to continue to be the practice.

It is in the activities of committees, however, that the difference between a body which is designed to be no more than the usual international conference and an organ which many hope to turn into a European parliament is particularly manifest. Committees of the Inter-American Conference are created for the individual Conference, and cease to function with its termination. The 1949 ordinary session of the Consultative Assembly, however, decided that its committees should sit between sessions,[4] and created a new Standing Committee.

Despite a marked lack of enthusiasm on the part of the Committee of Ministers, the Committee on General Affairs, the Economic Committee, the Social Committee, the Committee on Legal and Administrative Questions, the Committee on Cultural and Scientific Questions, and the new Standing Committee have all either had meetings in December 1949 or are to do so in the first few months of 1950. Their general function is to prepare for the next session of the Assembly—a task which is undertaken for the Inter-American Conference principally by the Council, the Pan-American Union, and the individual Governments. This activity on the part of committees between sessions is designed to, and does, give the Assembly a continuing life of its own apart from the initiative of the Governments. It is a type of activity more characteristic of national parliaments than of international conferences and, as such, is considered particularly important by the proponents of European union, whether they be federalists or non-federalists.

The Standing Committee of the Council of Europe provides a further element of continuity for the Consultative Assembly, which has no precise parallel within the O.A.S. Composed of the President of the Assembly, the four Vice-Presidents, the six chairmen of committees, and seventeen other members of the Assembly, the Standing Committee is to meet on call of the President, and at least four times a year. Its functions are to co-ordinate the resolutions of the Assembly and the work of its committees, to prepare for the following session of the Assembly, and, 'in general, [to] take any measures that appear calculated to facilitate or expedite the work of the Assembly'.[1] In establishing the Standing Committee, the Assembly also provided that:

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[1] Charter, Arts. 35 and 36.

[2] Statute, Art. 32. The maximum length of the session is fixed at one month, but this period may be extended by agreement of the Committee of Ministers and the Consultative Assembly.

[3] Ibid., Art. 34. The President of the Assembly must concur in the time and place of the special session.

[4] The report of the Economic Committee adopted by the Assembly provided, for example, that the Committee should sit between sessions, be authorized to establish sub-committees, and hear evidence from experts. The Appendix to the report indicates that four sub-committees have been set up: Finance and Currency; Commercial Policy; Industry, Agriculture, and Food; and Public Works (Consultative Assembly, Doc. No. 71).

> 'The President of the Assembly, acting on behalf of the said Permanent [Standing] Committee, will consult with the Committee of Ministers as to the advisability of convening an extraordinary Session, and also in regard to any matter arising out of the Agenda of the previous session.'[2]

Since the Council of Europe represents a more venturesome type of organization than the O.A.S., it might be expected that the former's voting provisions would be more liberal than those of the latter. That is not the case. The individual Governments have a greater degree of formal control over the action of the Committee of Ministers than have the Members of the O.A.S. over the action of the Conference, Meeting of Consultation, or Council. The Committee of Ministers may make recommendations to the Governments only by unanimous consent of the representatives voting and a majority of the total membership of the Committee. The same unanimity is required for the submission of statements of the Committee's activities to the Consultative Assembly, for a decision to hold a Committee meeting in public rather than in private, for a decision as to what information shall be given the press with regard to the proceedings of a private meeting, for a decision to hold an ordinary session of the Consultative Assembly elsewhere than at Strasbourg, and for all other questions which the Committee, by a two-thirds majority of the representatives voting and a majority of the total membership of the Committee, decide to place in that category.[3] Abstention is thus possible, but a right of veto does exist with respect to the matters indicated. Other decisions require lesser majorities.[4] In contrast, the most important decisions which can be made by either the Meeting of Consultation or the Council of the O.A.S. are those taken under the Rio Treaty. These decisions, including the decision of the Meeting of Consultation to impose sanctions, require only a two-thirds majority of the states which have ratified the Treaty. A decision taken by this majority to apply sanctions binds all the parties to take the measures stipulated, with the sole exception that no state is itself bound to use armed force without its own consent.[1]

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[1] Council of Europe, Consultative Assembly, Ordinary Session 1949, Doc. No. 87, 'Recommendations to the Committee of Ministers Adopted 6th September 1949 on . . . Consideration of any necessary changes in the political structure of Europe to achieve a greater unity between the Members of the Council of Europe and to make an effective European co-operation in the various spheres specified in Article 1 of the Statute', Part II.

[2] Ibid.

[3] Statute, Art. 20 (*a*).

[4] See Art. 20 (*b*), (*c*), and (*d*).

Similarly, unanimity is not required for the making of recommendations or drafting of conventions by the Inter-American Conference. Under the Charter of the O.A.S., the regulations of each Conference are to be drawn up by the Council for subsequent approval of the Governments.[2] This has long been the custom, however, and the Regulations of the Rio and Bogotá Conferences indicate the normal voting practice. A voting quorum requires a two-thirds majority of the states represented at the Conference;[3] projects are approved by an absolute majority of the delegations represented at the meeting where the vote is taken.[4] These provisions are very liberal. It should be pointed out, however, that in practice every attempt is usually made to compromise opposed viewpoints and to reach unanimity in final decisions.

The Statute of the Council of Europe permits the Consultative Assembly to determine its own rules of procedure (including the fixing of a quorum). It also provides, nevertheless, that recommendations to the Committee of Ministers, and resolutions proposing topics for the agenda, establishing committees and determining the date of Assembly sessions, shall require a two-thirds majority of the representatives present and voting. The majorities required for matters of internal procedure, including the adoption of rules of procedure, are to be decided by the Assembly by a two-thirds majority of the representatives voting.[5]

It is evident from what has been said above that whereas the O.A.S. is a fairly mature organism which has developed along the usual pattern of the species, the Council of Europe constitutes a mutation. The old conference form has been retained by the Committee of Ministers, but the Consultative Assembly is a new phenomenon. Moreover, it is far from certain that the present structure of the Council of Europe will continue indefinitely, given the strength of existing pressures for change in the direction of greater European unity. In this connexion it should be recalled that, apropos of the declaration of ultimate intent to establish 'a European political authority with limited functions but real powers', the 1949 Consultative Assembly directed its General Affairs Committee to make a study of the steps to be taken to achieve closer political unity and to report to the

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[1] Rio Treaty, Arts. 17 and 20. See also Charles G. Fenwick, 'The Voting Procedure in Inter-American Conferences', *Inter-American Juridical Yearbook*, pp. 91–4.

[2] Charter, Art. 38.

[3] Art. 20 of the Regulations of the Rio Conference (*Report of American Delegation*, p. 160); Art. 30 of the Regulations of the Bogotá Conference (ibid., p. 299).

[4] Art. 24 of the Regulations of the Rio Conference (ibid., p. 160); Art. 34 of the Regulations of the Bogotá Conference (ibid., p. 300).

[5] Statute, Arts. 28 to 30.

President of the Assembly by 30 April 1950. The Committee was directed to examine:

> '(*a*) The general position of the Member States of the Council of Europe considered as a whole;
> '(*b*) The present situation with regard to existing inter-governmental organisations;
> '(*c*) The different proposals for extended collaboration in the political, economic, social and cultural fields;
> '(*d*) The modifications in the political and constitutional structure of the Member States which such a collaboration would entail;
> '(*e*) Federal as well as other proposals for the future political development of Europe; and
> '(*f*) The effects on each Member State of any such measures as these proposals imply.'

The Assembly expressed the desire that the report of the General Committee be placed upon the agenda of the 1950 session, and that the Committee of Ministers 'propose to the Members of the Council of Europe that the recommendations then adopted by the Assembly shall be immediately discussed by the respective Parliaments'.[1]

The General Affairs Committee has already begun its task.[2] The European Movement is accelerating its activities. While it seems improbable that the Council of Europe will give way to a European federation in the near future, the seeds of change have been sown and it seems likely that the European regional organization has not yet found its permanent form.

III

The similarities and dissimilarities in the scope and functions of the two organizations are summed up in their respective statements of purpose. The purposes of the O.A.S. are stated in Article 4 of the Charter to be:

> '(*a*) To strengthen the peace and security of the continent;
> '(*b*) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States;
> '(*c*) To provide for common action on the part of those States in the event of aggression;
> '(*d*) To seek the solution of political, juridical and economic problems that may arise among them; and
> '(*e*) To promote, by cooperative action, their economic, social and cultural development.'

The aim of the Council of Europe, according to Article 1 (*a*) of its Statute, 'is to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress'. This is elaborated in Article 1 (*b*) of the Statute:

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[1] Consultative Assembly, Doc. No. 87, Part I.

[2] See the highly interesting analysis presented to the December 1949 meeting of the General Affairs Committee (Council of Europe, Consultative Assembly, Committee on General Affairs, Second Session, AS/AG [49] 6, 'Study of Changes in the political structure of Europe . . . Analysis submitted by Monsieur Guy Mollet, Rapporteur. . . .'

> 'This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal, and administrative matters and in the maintenance and further realization of human rights and fundamental freedoms.'

From these and other provisions of their basic instruments it is apparent that the scope of the functions of the O.A.S. and the Council of Europe differ in two highly important respects. The first is the complete exclusion of questions relating to defence from the jurisdiction of the Council,[1] whereas defence against aggression represents a new, but vital, part of the work of the O.A.S. As noted above, this does not, of course, reflect a lack of preoccupation of Western Europe with the problem, but rather the handling of it by other agencies, namely those of the Brussels Treaty and the Atlantic Pact. The second point is the absence of any mention of the settlement of disputes in the Statute of the Council of Europe, whereas pacific settlement has occupied the attention of the O.A.S. from its inception, and a series of alternative procedures is now outlined in the Pact of Bogotá. Again, this does not indicate an absence of interest of the European Powers in pacific settlement; it results, rather, from the fact that the United Nations Charter both lays down the obligation of pacific settlement and offers procedures to that end. There is, moreover, no feeling in Western Europe, comparable with that in the Western Hemisphere, that regional disputes should in principle be settled by regional agencies in preference to universal bodies.

There has never been any question, within the O.A.S., as to the right of the Inter-American Conference to deal with any question which the Governments, in drafting the agenda, were willing to submit to it. There is equally no question of the right of the Consultative Assembly of the Council of Europe, under the Statute, to debate any question falling within the scope of the organization and approved for its agenda by the Committee of Ministers. In both cases, the agenda is ultimately controlled by the Member Governments.[2] Dissatisfied with this position, the Consultative Assembly, after having secured the approval of the Committee of Ministers to an extension of the proposed agenda for its first ordinary session,[3] recommended to the Committee of Ministers that the Statute be amended to give the Assembly complete freedom of discussion and recommendation

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[1] Statute, Art. 1 (*d*).

[2] Charter, Art. 38; Statute, Art. 23.

[3] Council of Europe, Consultative Assembly, Ordinary Session 1949, AS/CR/5, *Official Report* (Provisional), Fifth Sitting, Tuesday, 16 August 1949, p. 2, contains the text of M. Van Zeeland's letter of 13 August approving on behalf of the Committee of Ministers the enlarged agenda, with certain minor verbal changes.

'within the aim and scope of the Council of Europe as defined in Chapter I'.[1] While declining to undertake any amendment of the Statute at this time, the Committee of Ministers conceded at its meeting of 4 November 1949 that any topic which the Assembly might in future wish to discuss, subject to the above limitations, would be approved by the Committee.[2]

It was assumed from the outset that the Council of Europe would consider political questions. Indeed, the need to defend the Western conception of democracy and individual liberty was a major reason for setting up the organization, as is clearly indicated in the Preamble to the Statute as well as by the statement of aims in Article 1. Further evidence of its jurisdiction over political matters was the inclusion in the agenda of the 1949 session of the Consultative Assembly of the topic:

> 'Consideration of any necessary changes in the political structure of Europe to achieve a greater unity between the Members of the Council of Europe and to make an effective European co-operation in the various spheres specified in Article 1 of the Statute.'[3]

In the Western Hemisphere organization, in contrast, every effort was made in the early years to prevent political functions from being exercised by organs of the system, even to the point of specifically denying political functions to the Pan-American Union and its Governing Board in the Convention and Resolution on the Pan-American Union, adopted by the Sixth Conference in 1928.[4] This action was primarily occasioned by a fear that the United States would dominate any permanent organ which might be entrusted with political functions, and not even the reorganization of the Governing Board undertaken at the Mexico City Conference[5] served to dissipate this fear entirely, as far as that body was concerned. This distrust has had an impact primarily on the arrangements for security and pacific settlement, although it has also affected the general grant of powers made to the Council by the Bogotá Conference.

The idea of a permanent committee, through which the Governments would consult in case of aggression or threat of aggression, was rejected by both the Inter-American Conference for the Maintenance of Peace (Buenos Aires, 1936) and the Eighth Conference (Lima, 1938), and it was decided that consultation should take place through Meetings of Ministers of Foreign Affairs of the American Republics (i.e. a non-permanent body), when need arose. The Act of Chapultepec, 1945, in providing sanctions temporarily for the system, left the matter in the hands of the same body.[1] The Rio Conference, in making permanent security arrangements, determined that the body which should act to implement the Treaty of Reciprocal Assistance should continue to be the Meeting of Ministers of Foreign Affairs (renamed the Meeting of Consultation of Ministers of Foreign Affairs at Bogotá), but made the concession that the Governing Board (renamed the Council at Bogotá) might act provisionally, pending the convocation of the Meeting.[2]

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[1] Council of Europe, Consultative Assembly, Ordinary Session 1949, Doc. No. 87, Part III.

[2] *The Times* newspaper, 4 November 1949.

[3] Council of Europe, Consultative Assembly, Ordinary Session 1949, *Minutes of Proceedings*, No. 5, Appendix 3.

[4] Resolution of the Sixth Conference, Part III: 'Neither the Governing Board nor the Pan-American Union shall exercise functions of a political character' (*International Conferences of American States* (1931), p. 398). Art. 6 of the Convention: 'Both the Governing Board and the Pan-American Union shall discharge the duties assigned by this Convention subject to the condition that they shall not exercise functions of a political character' (ibid., p. 400).

[5] *Final Act*, Resolution IX, points 3 and 5.

The issue of political functions for the Board was nevertheless raised again at Bogotá, in connexion with the drafting of the Charter. Argentina, Chile, and Panama, in particular, wanted to deprive the Council of all political functions, including those given it under the Rio Treaty. For the first time, the basic reason for the reluctance to allow the Council to exercise political functions was brought out in formal debate when the Chilean delegate indicated that his Government was in part motivated by a desire to avoid even an impression that the Council was dominated by the American Government.[3] The Conference finally compromised on the matter by continuing to permit the Council to act provisionally under the Rio Treaty, at the same time reiterating that, in case of armed attack, the Meeting of Consultation is to be held 'without delay',[4] and specifying that in such case the Chairman of the Council should convoke the Meeting 'immediately'.[5]

An interesting result of this provision appeared in the Costa Rica–Nicaragua incident of 1948–9. The Costa Rican Ambassador to Washington appealed to the Council under Article 6 of the Rio Treaty[6] on 11 December 1948 charging that Costa Rica had been invaded during the night of 10 December by armed forces issuing from Nicaragua. It was not alleged that the Nicaraguan army had invaded Costa Rica, but rather that Nicaragua had tolerated, fomented, and assisted a conspiracy of private individuals to overthrow the Government of Costa Rica by force of arms. The Council, on 14 December, convoked a Meeting of Consultation, but without specifying the date or place of the Meeting, and itself sent a commission immediately to investigate the incident. The report of the commission of investigation was approved on 24 December, and a commission of military experts was designated on the same day to facilitate compliance with the recommendations of the report. The incident was concluded by the signature at Washington on 21 February 1949 of a Pact of Amity by the two Governments concerned. On the same day the Council resolved to inform the Governments of the termination of the incident, and of the fact that the circumstances giving rise to the calling of the Meeting of Consultation no longer existed.[1] The Council had taken the position that the formality of convoking the Meeting of Consultation must be complied with, but the affair was handled from beginning to end by the Council. The peace had been maintained without actual resort to the Meeting. Given this precedent, the only substantial barrier to future action by the Council in this type of case would seem to be government instruction of enough of the members of the Council to defeat a motion to take action. In a more serious incident than the one outlined, of course, such instruction might well be forthcoming.

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[1] *Final Act*, Resolution VIII, Part I.

[2] Rio Treaty, Arts. 11 and 12.

[3] He made it clear at the same time that the Department of State had not sought to dominate the Board in the past (*Ninth Conference, Report of American Delegation*, p. 21).

[4] Cf. Rio Treaty, Art. 3.

[5] Charter, Arts. 43 and 52. See also Art. 25, and *Ninth Conference, Report of American Delegation*, p. 22.

[6] Rio Treaty, Art. 6: 'If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defence and for the maintenance of the peace and security of the Continent.'

In the case of pacific settlement, the disinclination to give a permanent body political functions resulted in a failure of the earlier treaties to assign the Governing Board any substantive functions with respect to disputes. The Draft Organic Pact,[2] which was submitted to the Bogotá Conference by the Governing Board as a basis for the Conference work in drafting the definitive Charter of the O.A.S., would have permitted the Meeting of Consultation, or provisionally the Council, to recommend methods of settlement where a controversy might endanger the peace of the Hemisphere.[3] After brief consideration, this was rejected by the Conference.[4] The Conference likewise decided that neither the Meeting of Consultation nor the Council should be empowered to recommend the terms of a settlement.[5] The Pact of Bogotá, in outlining detailed procedures for settlement, confers only limited powers on the Council. It is to assist in convening commissions of investigation and conciliation; on request of a party to the dispute, it may recommend measures to preserve the *status quo* until such commissions are convened; it is to help to establish arbitral tribunals.[1] It is not itself authorized to settle disputes by conciliation. The Costa Rica–Nicaragua case referred to above would seem to indicate, however, that in cases arising under the Rio Treaty, the Council—as well as the Meeting of Consultation—does, in fact, have some power to help bring about the settlement of disputes in its capacity of provisional Organ of Consultation. The extent of that power is not yet clearly defined.

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[1] A documentary history of this affair is to be found in *Primera Aplicación del Tratado Interamericano de Asistencia Recíproca* (Pan-American Union, 1949); an English text of the Pact of Amity and of the report of 24 December 1948 may be found in *Pact of Amity Between the Governments of the Republics of Costa Rica and Nicaragua* (Pan-American Union, 1949), pp. 7–12 (Law and Treaty Series No. 30). For an analysis of Council action in this case see 'The Application of the Treaty of Rio de Janeiro . . .', in *Inter-American Juridical Yearbook*, pp. 146–50 (reprinted from the *American Journal of International Law*, 43 (1949)).

[2] Reprinted in full in *Ninth Conference, Report of American Delegation*, pp. 95–111.

[3] Arts. 7 and 8.

[4] '. . . apparently on the conceptual theory that the compulsory arbitration provisions of the pacific-settlement treaty assure the settlement of any dispute and render unnecessary the intervention of any multilateral agency to recommend procedures to be followed' (*Ninth Conference Report of American Delegation*, p. 52).

[5] Ibid.

The last point at which distrust of a permanent political agency was manifest at Bogotá was in the general functions of the Council. The Mexico City Conference had authorized the Board to:

> '. . . take action, within the limitations imposed upon it by the International Conferences of American States or pursuant to the specific direction of the Meetings of the Ministers of Foreign Affairs, on every matter that affects the effective functioning of the inter-American system and the solidarity and general welfare of the American Republics.'[2]

The Draft Organic Pact included a very similar statement of functions, in line with the provisions of this Resolution.[3] The Conference reduced this rather broad grant of power, and Article 50 of the final Charter reads:

> 'The Council takes cognizance, within the limits of the present Charter and of inter-American treaties and agreements, of any matter referred to it by the Inter-American Conference or the Meeting of Consultation of Ministers of Foreign Affairs.'

The Council was thereby deprived of much of the initiative given to it at Mexico City—a rather unnecessary precaution, since the members of the Council are appointed and instructed by their respective Governments.

The scope of activities of the two organizations in the 'non-political' realm is considerable. The O.A.S. has operated extensively in this field, as is seen from countless resolutions of the numerous regular and special conferences which have been held since 1889. A glance at the list of official and semi-official O.A.S. specialized agencies also demonstrates the extent of the development of Western Hemisphere co-operation in economic, social, cultural, and other questions.[4] The large number of these agencies, and the fact that many were established without reference to each other or to the Pan-American Union, created an important problem in the past which is now in the process of being solved. The Charter entrusted the task of co-ordination primarily to the Council of the O.A.S., and authorized it to propose to the Governments and the Inter-American Conference the creation, adaptation, or elimination of specialized agencies, to make recommendations for the co-ordination of the programmes of these agencies, in consultation with the latter, and to conclude agreements defining the relations between the agencies and the Organization.[1] The Inter-American Economic and Social Council was given the special task of co-ordinating 'all official inter-American activities of an economic and social nature'.[2]

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[1] Arts. 16, 20, 30, 40, 45, 49, and 51.

[2] *Final Act*, Resolution IX, point 4.

[3] Art. 35.

[4] The following are now listed by the Pan-American Union as official specialized organizations: The American International Institute for the Protection of Childhood, the Inter-American Juridical Committee, the Inter-American Defence Board, the Inter-American Indian Institute, the Inter-American Institute of Agricultural Sciences, the Inter-American Radio Office, the Permanent Institution of the Pan-American Highway Congresses, the Pan-American Institute of Geography and History, the Pan-American Sanitary Bureau, the International Office of the Postal Union of the Americas and Spain. Semi-official agencies include: The Inter-American Statistical Institute, the Pan-American Coffee Bureau, the Pan-American Commission of Inter-Municipal Co-operation, and the Permanent International Commission of the Pan-American Congress of Railways (see *Organisation of American States; A Handbook* . . . (1949), pp. 42–8).

There is no limit under the Statute of the Council of Europe to the activities of the Committee of Ministers in the economic, social, cultural, administrative, or legal fields. It is stipulated, however, that the Committee, in approving topics for the agenda of the Consultative Assembly, is to 'have regard to the work of other European inter-governmental organizations to which some or all of the Members of the Council are parties'.[3] This provision reflected a consciousness of the existence of a problem which the O.A.S. does not have to face: namely, the problem of possible conflicts of jurisdiction, or overlapping of functions, with other regional agencies which are quite independent of it. The particular problem was posed by the existence of O.E.E.C. and by the desire of the Member Governments not to prejudice its activities in any way. The Governments themselves, as represented in the Committee of Ministers, could be counted upon not to allow a conflict to develop between this organization and O.E.E.C., in which they were also represented. It was not at all certain that the members of the Consultative Assembly would exercise the same caution. In point of fact, the Assembly, at its first session, found it impossible to avoid discussing the work of O.E.E.C., and did make recommendations to the Committee of Ministers as to topics within the scope of that agency.[4] The Assembly also, however, recognized the need for liaison with O.E.E.C., and in Part III of the report of the Economic Committee as adopted by the Assembly it was recommended that the President of the Assembly be asked to arrange for access to the documents of O.E.E.C. (among other agencies) and for officials of that organization to be heard on request by the Economic Committee.[5] The serious concern of the Committee of Ministers with the problem of duplication was evidenced in its communiqué of 4 November 1949 both by its reference of the Assembly's economic recommendations to O.E.E.C. for its observations, and by the explicit statement that: 'Le Comité des ministres estime, en effet, qu'il est indispensable d'éviter les doubles emplois et les gaspillages de moyens de personnels qui résulteraient de ces doubles emplois.'[1] The reply to this latter pronouncement was given by the Economic Committee at its meeting of 15 December 1949 in a resolution which stated:

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[1] Charter, Art. 53.

[2] Ibid., Art. 64 (*b*).

[3] Statute, Art. 23 (*b*).

[4] See, for example, Part I of the report of the Economic Committee as approved by the Assembly, in which the Assembly recommended to the Committee that it 'take all practical steps to establish as quickly as possible a multilateral system of payments, including the restoration of the inter-convertibility of European currencies . . .' (Consultative Assembly, Doc. No. 71, p. 2).

[5] Ibid., p. 4. The other agencies were the Economic Commission for Europe and the Bank for International Settlements.

> 'In view of the identity of aim of O.E.E.C. and the Council of Europe in the economic sphere,
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> '. . . it is urgently necessary to establish a functional liaison between the Council of Europe and the O.E.E.C., for the purpose of co-ordinating without delay, in the interests of the unity and prosperity of free Europe, the technical preparation of O.E.E.C. and the political activities of the Assembly, the latter being the expression of the common will of the various European Parliaments.[2]

The Consultative Assembly was apparently not concerned with the problem of duplication of the work of the Brussels Treaty Organization or other smaller regional groups in the cultural field, and made no recommendations as to liaison with these other agencies. The Committee of Ministers, however, at its session of 4 November 1949, did decide to refer the cultural recommendations of the Assembly to the Brussels Treaty Permanent Commission and to the cultural commission of the Scandinavian countries, as well as to U.N.E.S.C.O.[3]

The problem of liaison with United Nations agencies, as opposed to non-United Nations inter-governmental agencies operating in the same geographical region, has received attention from both the O.A.S. and the Council of Europe. The O.A.S., however, has made the more formal and general attempt to ensure co-operation with the world organization. Article 53 of the O.A.S. Charter states that it is one of the functions of the Council 'to promote and facilitate collaboration between the Organization of American States and the United Nations, as well as between Inter-American Specialized Organizations and similar international agencies'. Moreover, Article 61 directs the organs of the Council (namely, the Inter-American Economic and Social Council, the Inter-American Council of Jurists, and the Inter-American Cultural Council), 'in agreement with the Council', to 'establish co-operative relations with the corresponding organs of the United Nations and with the national or international agencies that function within their respective spheres of action'. Liaison is further provided by the stipulation, in Resolution XXXIX of the Bogotá Conference, that the Secretary-General of the United Nations or an alternate be invited to attend the Inter-American Conferences and Meetings of

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[1] 'Communiqué du Comité des Ministres du Conseil de l'Europe', *La Documentation Française, Bulletin Quotidien de Presse Étrangère*, No. 1,421 (7 November 1949), p. 3.

[2] Council of Europe, Consultative Assembly, AS/EC (49) 6, 15 December 1949, 'Resolution adopted by the Committee on Economic Questions of the Consultative Assembly of the Council of Europe'.

[3] 'Communiqué du Comité des Ministres du Conseil de l'Europe', loc. cit., p. 3.

Consultation of Ministers of Foreign Affairs, 'in order that the Members of the world organization may be kept informed as to the work and the conclusions of those conferences'.[1]

These provisions for liaison between the O.A.S. and the United Nations are highly appropriate. That they require implementation is also apparent. In their anxiety to obtain assistance in the solution of their serious post-war economic problems from all possible sources, the Latin-American nations succeeded, on 25 February 1948, in securing the establishment of a United Nations Economic Commission for Latin America (E.C.L.A.). Belatedly recognizing the essential similarity of the functions of E.C.L.A. and the Inter-American Economic and Social Council, the Bogotá Conference called for a meeting of representatives of both entities 'to draft an appropriate formula for the functioning of the two organizations, and to outline their respective fields of activity and their general programs, including liaison between the two organizations, so as to avoid the aforesaid duplication in organization, personnel and functions'.[2]

In one instance, potential duplication of activities has been avoided by the creation of a joint O.A.S.–United Nations agency. The Pan-American Sanitary Bureau, established in 1902, is not only a specialized agency of the O.A.S.; by virtue of arrangements made pursuant to the constitution of the World Health Organization, it also functions as a regional branch of the latter.[3] There was some fear that this type of solution would prejudice the identity of inter-American agencies, however, and the American Republics therefore inserted a provision in the Charter that:

> 'The Specialized Organisations shall establish cooperative relations with world agencies of the same character in order to coordinate their activities. In concluding agreements with international agencies of a world-wide character, the Inter-American Specialized Organisations shall preserve their identity and their status as integral parts of the Organisation of American States, even when they perform regional functions of international agencies.'[4]

There is no mention in the Statute of the Council of Europe of liaison with United Nations agencies. The Consultative Assembly, in adopting the report of its Economic Committee on 5 September 1949, however, requested the Assembly President to arrange for access to the documents of E.C.E. and B.I.S. as well as to those of O.E.E.C., and for officials of these bodies to be heard by the Committee on request.[5] Furthermore, the Assembly, in adopting the report of its Cultural Committee, expressed the hope that liaison would be established with U.N.E.S.C.O. in so far as its recommendations 'relate to those for which U.N.E.S.C.O. is responsible at a European level. . . .'[1] As noted above, the Committee of Ministers has already referred the Assembly's cultural recommendations to U.N.E.S.C.O. for consideration. Subsequently, it was reported that the Executive Council of U.N.E.S.C.O. had authorized its Director-General to co-operate with the Council of Europe.[2]

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[1] *Ninth Conference, Report of American Delegation*, p. 272.

[2] *Final Act*, Resolution X.

[3] See Art. 54 of the W.H.O. Constitution (reprinted in this *Year Book*, 24 (1947), p. 459.

[4] Art. 100.

[5] Consultative Assembly, Doc. No. 71, p. 4.

While, therefore, the scope of the activity of the O.A.S. is wider than is that of the Council of Europe, both face the problem of their relationship to other organizations in carrying out their respective functions. The major expansion of O.A.S. activity has already taken place, although some extension in the economic and social fields is still sought. In contrast, the Council of Europe is just beginning to set its course, and the Consultative Assembly may be expected to press for increased activity in all fields. If this occurs, the problem of defining the Council's relationship to other organizations will become even more important than it is to-day.

IV

Of the two regional organizations which have been discussed, one represents an organization of states which is almost co-terminous with a geographical region, one which has developed along the familiar lines of international organization, and which has provided machinery for dealing with pacific settlement, defence against attack, and the whole gamut of economic, social, and cultural problems. It is an organization of states which, while sincerely professing allegiance to the United Nations, prefer to settle Hemisphere problems within the Hemisphere. The other represents a group of states within Europe but which is not co-terminous with Europe, since a political or ideological prerequisite has been added to the geographical requirements for membership. It is an organization which does not conform completely to the traditional pattern of international organization and which, while concerned with a host of political, economic, social, cultural, and other problems, leaves pacific settlement to the United Nations and security to the United Nations Charter and the Atlantic Pact.

The two organizations are alike in a number of matters of significance:

1. In neither organization have the Member Governments abdicated a major share of their respective powers to international organs beyond their own control. There is, however, this important difference: unlike the O.A.S., the European Governments, in setting up the Consultative Assembly, have created an organ capable of generating political pressures that the Governments may find it increasingly difficult to resist—pressures to which the Members of the O.A.S. are not subject, and which may

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[1] Consultative Assembly, Doc. No. 101, pp. 4-5.

[2] *Le Monde* newspaper, 7 December 1949.

ultimately result in important changes in the present structure of the Council of Europe.

2. The O.A.S. and the Council of Europe are alike in that both face the problem of their relationship with other organizations. Since neither exists in a vacuum, both must define their jurisdictions with respect to—and arrange appropriate working relationships with—not only their Member Governments, but also other regional organizations, the United Nations, and the latter's specialized agencies. Any other course can only lead to confusion.

3. Both organizations seek to provide a fuller and a more secure life for the peoples of the Member states. Both are likely to pursue these aims until a world organization succeeds in providing the degree of personal and national security and well-being which the Members of the two organizations consider essential—and, at least in the case of the O.A.S., quite conceivably beyond that point.

APPLICATION OF THE MAXIM *MOBILIA SEQUUNTUR PERSONAM* TO BANKRUPTCY IN PRIVATE INTERNATIONAL LAW

By WALTER RAEBURN, K.C., LL.M.

1. *The 'misleading' maxim that personal property has no locality*

WHAT Lord Loughborough in 1791 referred to as 'a clear proposition, not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality',[1] has now become a very much discredited maxim. Wolff calls it 'the old rule of the statutists',[2] and explains how it is derived from the conception, which once corresponded with social habits, that personal belongings were carried about by their owner wherever he went. Where the owner was, there would be his treasure also. When, however, this assumption became mainly fictitious, the rule itself became subject to the fiction that a man's personal chattels were to be regarded as being where he ordinarily lived and worked, that is to say, in the place of his domicil. No doubt in most cases that assumption, too, corresponded broadly with the facts. Movable property was usually to be found either at its owner's home or at his place of business; and again, so far as concerned continental people, their place of work was seldom enough far from where they lived. With the British, however, and the Americans, it was generally otherwise. These seafaring folk were constantly travelling, and the goods which they possessed were often and for long in course of transit. It is not surprising, therefore, to find them still developing this 'rule of the statutists' whilst others were beginning to discard it.[3]

Thus it came about that with a changing view as to what constituted the domicil, the rule became wholly artificial. The domicil ceased to coincide with the *de facto* ordinary residence, and became dependent upon the settled intention of the *propositus*, if he could be shown to have formed one, with an overriding presumption in favour of his domicil of origin.[4] So at least it was in the countries of those same seafaring people where the common law has prevailed. In most countries embracing the civil law, the older and simpler conception of domicil in the main survives; and it is of much importance to bear constantly in mind the distinction between these widely different views of what, by identity of name, would appear to be the same concept.

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[1] *Sill* v. *Worswick* (1791), 1 H.Bl. 665, 690.

[2] Wolff, *Private International Law* (1945), p. 516.

[3] Ibid. The conception, as adapted to seafaring conditions, was of a notional attachment of chattels to the venue of their owner even when they were physically elsewhere, so as to keep them subject to the same law until there was a change of ownership.

[4] *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307; *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441. That domicil, moreover, is not necessarily coincident with the place where the *propositus* was born, but depends on the domicil of his father at the date of his birth. See *In re Craignish*, [1892] 3 Ch. 180, 184, *per* Chitty J.

Thus, were the maxim *mobilia sequuntur personam* to be strictly applied to a case within the scope of the common law, inconvenience to the point of absurdity might well result. As an example, a transaction affecting the title to fruit on sale in London, belonging to an Italian fruiterer living in Soho, would be governed by English or Italian law according to whether the fruiterer had or had not at the time of the transaction made up his mind to settle permanently in England!

As far back as 1858 Westlake, following the guidance of Savigny, maintained that the assignment of individual movables should be governed by the law of the country where the movables are situated at the time when the assignment takes place.[1] 'But', comments an editorial note in the *Law Quarterly Review* for 1891,[2] 'Westlake in 1858 writes in the tone of an author maintaining an opinion opposed to the weight of received authority.' The note continues by pointing out that the trend of English decisions had since justified Westlake, and had resulted in the noteworthy 'final establishment in England of Savigny's doctrine' in place of the theory that transfers of movable property were governed by the law of the owner's domicil. The immediate occasion of this note arose out of the decisions in *Alcock* v. *Smith*[3] and *In re Queensland Mercantile and Agency Company*,[4] both of which were in the following year affirmed in the Court of Appeal,[5] where it was held that assignments of individual movables were governed by the *lex rei sitae* notwithstanding the foreign domicil of the respective owners.

In the year 1901, however, Channell J. decided the much-discussed case of *Dulany* v. *Merry & Son*.[6] There American debtors, domiciled in the United States, had executed a deed of assignment of all their property to a trustee for the benefit of their creditors. Amongst the property included in the deed were certain movable assets in England. The deed was not registered as required by English law in the case of such deeds,[7] and it was accordingly contended on the part of execution creditors in England that it was void. Channell J. upheld the deed, and held that the English assets passed under it to the American trustee by virtue of the American domicil of their owners, the debtors.

This decision is commonly cited as an instance of the exception, in favour of general assignments of movables, from the rule that the *lex rei sitae* prevails over the *lex domicilii*. A contemporary editorial note in the *Law Quarterly Review*,[1] in mentioning the case as an authority for such an exception, commented that it was established under the influence, to a great extent, of Westlake that, in accordance with the doctrine of Savigny, the assignment of a given movable in conformity with the *lex situs* was, in general, to be held valid everywhere, 'and that the maxim *mobilia sequuntur personam* applies mainly to general assignments of the whole of a person's movable property, e.g. in consequence of death'.

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[1] Westlake, *Private International Law* (1st ed., 1858), p. 260.

[2] L.Q. Rev., vol. 7, p. 309.

[3] 7 T.L.R. 750; [1892] 1 Ch. 258 (C.A.).

[4] [1891] 1 Ch. 536, 545; [1892] 1 Ch. 219 (C.A.).

[5] L.Q. Rev., vol. 8, pp. 102–3.

[6] [1901] 1 K.B. 536.

[7] Deeds of Arrangement Act, 1887, s. 5; now Deeds of Arrangement Act, 1914, s. 2.

Wolff, too, relies on the decision as an authority in support of his proposition that the '*lex domicilii* principle' still applies 'in cases of general (universal) assignments of all movables, for example succession on death and assignment of all the debtor's property to a trustee for the benefit of creditors'.[2] He adds, however, to his footnote what purports to be a quotation from the judgment of Channell J. at p. 541, in which he is represented as saying that 'a transfer good according to the law of the domicil of the owner, and made there' is valid even if 'not conforming to the law of the country where the goods are situate'. Thereupon the learned writer comments that this reasoning is 'not unassailable'.[3]

That is as may be. But what Channell J. is reported[4] as having actually said is:

> 'It seems clear that a transfer of movables here good by our law would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicil of the owner, but there has not been quoted to me, nor have I found, any clear case of a transfer, good according to the law of the domicil of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate.'

This is a very different thing from saying that such a transfer is necessarily valid, and thus by inference that the *lex domicilii* must always prevail where there is a conflict of laws governing the validity of a transfer. The learned judge did no more than comment on the absence, where compliance with formalities was concerned, of any clear authority the other way. In fact he did not decide the case on any prevalence of the *lex domicilii* over the *lex rei sitae*. His final conclusion was expressed in these words:[5]

> 'In the view I take there is no English law which requires this deed to be registered. Consequently, there is no *lex rei sitae* to interfere with the operation of the maxim "*mobilia sequuntur personam*".'

It may respectfully be suggested that the concluding words could more aptly have read 'no *lex rei sitae* to interfere with the contractual operation of the deed'; but that is another, though very pertinent, matter. It is difficult to see, in the circumstances, what occasion there was for applying the maxim *mobilia sequuntur personam*. The debtors had purported to assign their property to the plaintiff; and in the absence of any bar imposed by the *lex rei sitae*, his title, good according to the proper law of the contract (which was not in issue), was good against all the world. On that ground it might well, it is submitted, be maintained that *Dulaney* v. *Merry & Co.*[1] is no authority for any proposition whatsoever affecting the maxim under discussion.

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[1] L.Q. Rev. vol. 17, p. 226.

[2] Wolff, op. cit., p. 517.

[3] Ibid., n. 10.

[4] [1901] 1 K.B. 536, 541–2.

[5] Ibid., at p. 547.

The latest pronouncement of English law[2] affecting the maxim is that of Lord Thankerton when delivering, in 1933, the judgment of the Privy Council in *Provincial Treasurer of Alberta* v. *Kerr*.[3] Dealing with the argument that movable property locally situated outside the Province of Alberta was, in favour of a person who died domiciled in Alberta, by the application of the maxim nevertheless notionally situated within the Province, the Board said:

> 'The Province next contended that, although locally situate outside the Province, the personal property of a person, who dies domiciled within the Province, is to be treated as "within the Province" for the purposes of s. 92 of the British North America Act, by reason of the application of the rule embodied in the maxim "mobilia sequuntur personam". This argument appears to proceed on a misunderstanding of the meaning and effect of that rule. If A dies domiciled in the United States of America, leaving movable property locally situate in England, the latter country has complete jurisdiction over the property, but the law of England, in order to decide on whom the property devolves on the death of A, will not apply the English law of succession, but will ascertain and apply the American law. In other words, it is the law of England—not the law of America—that applies the principle of mobilia sequuntur personam in exercising its jurisdiction over the movable property in England, the locus of the latter remaining unchanged; in no sense could the property be described as "within America".'

Thus was cut the last tenuous thread which bound movables, even notionally, to the personal situation of their owner. Changing habits had rendered it no longer true that movables physically followed him. Changed conceptions of domicil[4] in common-law countries had stultified the fiction that as he was domiciled where he usually lived and traded, that was where his movables were normally to be found, and were always to be deemed to be. For 'movables follow the person' the courts had substituted 'the personal law sometimes follows movables'. In every case[5] it was the *lex rei sitae* that was to govern the title to movables, although there would be certain classes of case in which that law, applying its own conflict rules, would import the personal law of the owner.[6]

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[1] [1901] 1 K.B. 536.

[2] Technically, the law of the Canadian Province of Alberta. But there is no difference on the point in question.

[3] [1933] A.C. 710, 721.

[4] Probably also the extension of bankruptcy jurisdiction to non-traders.

[5] That is to say, of a tangible as opposed to an intangible asset or a mere contract to assign, where the *lex actus* might be imported. Cf. *Republic of Guatemala* v. *Nunez*, [1927] 1 K.B. 669.

[6] With the substitution in many legal systems of the *lex patriae* for the *lex domicilii* as the

The attitude of English law[1] to the maxim is summarized in the current (6th) edition of Dicey[2] as follows:

> 'Equally sweeping dicta can be found in earlier cases for the proposition that the validity of transfers of chattels is governed by the law of the owner's domicile. But these dicta were expressly based on the misleading maxim[3] *mobilia sequuntur personam*, which meant that chattels wherever situated were deemed to follow the law of the owner's domicile. This is a useful rule for general assignments made on marriage and on death. In such cases it would be clearly inconvenient that each single chattel should devolve in a different way. But it does not follow that the same rule should be applied to particular transfers of individual chattels. It may have been true in early times that articles of personal estate were few and were usually located in the owner's domicile. It is entirely untrue in modern commerce. Accordingly, all modern writers and most modern judges have discarded the test of domicile, and it has been said[4] that all that the maxim *mobilia sequuntur personam* means to-day is that succession to movables is governed by the personal law of the deceased.'

2. *The maxim in relation to bankruptcy*

It is not the present purpose to examine critically the foregoing statement in its general application, but to consider in the light of the broad proposition which it expresses how far, if at all, a general assignment by operation of bankruptcy ranks with those 'general assignments made on marriage and on death' for which the maxim is acknowledged in the statement to provide 'a useful rule'.

A somewhat remarkable fact is that Westlake, the very protagonist in England in the attack upon the maxim, 'understood as regulating dealings with movables by the personal law of their owner',[5] not only makes an express exception in its favour in cases of 'the so-called universal assignments', but positively invokes the maxim as affording the basis on which the English courts, while refusing to recognize a foreign bankruptcy as such, and never co-operating with foreign judges in enforcing it, yet allow

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personal law for some or all purposes, the gap between fact and fiction in connecting the physical whereabouts of movables with that of their owner was widened yet farther.

[1] The attitude of American law would seem to be similar and, if anything, even more categorical in applying the *lex situs* in regulating the disposition of movables. See *American Restatement, Conflict of Laws*, §§ 255 ff. In the particular case, however, of a voluntary assignment (as distinguished from one by operation of an insolvency or bankruptcy act of a state) for the benefit of creditors of all the chattels and other movables of a debtor, the *lex actus* prevails wherever the goods may be, subject always to the right of any state to give or not to give a preference to local attaching creditors, and further subject to any overriding provisions of a Federal Act. An assignment, however, in accordance with a state insolvency law has no extraterritorial force. Ibid., §§ 263, 264.

[2] Dicey, *Conflict of Laws* (6th ed., 1949), p. 559, note by Morris.

[3] Ibid., at pp. 558, 559, and 560. Morris repeats the expression 'misleading maxim' in the same connexion; at p. 570 he refers to the maxim as 'outworn'; and Parry, in a note at p. 309, also speaks of 'the often misleading maxim'.

[4] Citing *Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710, 721, *supra*, p. 180.

[5] Westlake, *Private International Law* (7th ed. 1925), p. 193, citing Foelix, Savigny, and decisions of the United States courts.

it to operate in England as to movables as an assignment in the country where the bankruptcy was declared.[1]

That proposition is very widely stated and will probably not bear close examination. It does, however, directly raise the point under consideration, that is to say, whether the maxim has any application to bankruptcy. Implicit in the proposition there seem to be two separate but converging ideas which may be expressed as follows:

1. 'This is a universal assignment. "*Mobilia sequuntur personam.*" Therefore it has caught all the debtor's movable property, including that which is here.'
2. 'Bankruptcy involves personal status. "*Mobilia sequuntur personam.*" Therefore our conflict rules import the debtor's personal law as regards his movable property which is here.'

It may at once be objected that the second of these statements, so far from being implicit in Westlake's proposition, is expressly excluded from it by his insistence that a foreign bankruptcy is never recognized as such. While that, on the face of it, is true, it is demonstrable that this second statement is inevitably involved in the first.

There is no necessary connexion at all between a universal assignment *per se* and the maxim *mobilia sequuntur personam*. If a domiciled Frenchman were made bankrupt in England, his movable assets in France would, it is true, vest in the English trustee in bankruptcy. But they would do so in virtue simply of the positive provisions of English law, and not in any way because of his personal law which, *ex hypothesi*, is French. Indeed, it would only be by virtue of an event affecting status that the personal law would be invoked at all. A declaration of bankruptcy would be such an event; but not unless the bankruptcy were declared (or at least recognized as a bankruptcy) by the forum of the debtor's domicil.[2] It follows therefore that the first of the above statements is only correct where the universal assignment is the consequence of a bankruptcy (*a*) recognized as such and (*b*) in conformity with the debtor's personal law. Thus, not merely is the second statement imported into the first, but Westlake's proposition that the English courts, while refusing to recognize a foreign bankruptcy as such, will allow it (apparently whether declared in the forum of the debtor's domicil or not), by virtue of the maxim, to operate as an assignment of movables in England, must necessarily fall to the ground.

That, however, is not the sole fallacy behind the attempted application of the maxim to cases of bankruptcy. Even if it be granted that the maxim may apply, by way of exception, to universal assignments as opposed to particular assignments of movables in foreign countries, it is not true that bankruptcy necessarily involves a universal assignment. In German law there is no assignment at all. The bankrupt is restrained from dealing with his property, which is placed under the control of an administrator. But there is no change of title. Nor does the whole of the bankrupt's property necessarily come within reach of the administrator.[1] Similarly, in Austria, while in theory all movable assets whatsoever fall into a bankruptcy, the strict insistence on reciprocity with foreign countries as regards mutual claims to such assets situated within one another's jurisdiction results in practice in something very like purely territorial administration.[2] Again, in the United States of America there is a strong territorial bias, which limits in practice the theoretical assignment of a bankrupt's movable assets outside the jurisdiction of the *forum concursus*. It is even debatable how far the law vests in an American trustee assets which are situated outside the United States.[3]

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[1] Westlake, op. cit., pp. 166–7.

[2] Or nationality, where the *lex patriae* is recognized as the personal law.

In addition to the want of generality in the assignment (if any) arising in many cases out of bankruptcy, it does not necessarily follow that bankruptcy affects status. According to the common law conception there is no doubt that it does so. But the civil law jurists are not unanimous on the subject. In Belgium the orthodox view is that status is the very basis of bankruptcy jurisdiction.[4] Nevertheless, Rolin, perhaps the most distinguished of all Belgian experts in the law of bankruptcy, denies altogether that bankruptcy is a matter of status in the strict legal sense.[5] In his view, the personal disability that flows from bankruptcy is not the consequence of bankruptcy as such, but of particular bankruptcy laws. So too von Bar,[6] pointing to the view in French law that bankruptcy proceedings affect status, argues that the French procedure in relation to foreign bankruptcies is quite inconsistent with that theory, and can only be reconciled with the contrary view that bankruptcy does not affect the debtor's status or belong to his personal law. The bankrupt, he points out, does not, as such, become incapable of acting. He simply loses his power of dealing with his estate.

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[1] See von Bar, *Theory and Practice of Private International Law* (2nd ed., Gillespie's translation, 1892), §§ 477–9; Nussbaum, *Deutsches Internationales Privatrecht* (1932), § 67, pp. 450 ff.

[2] *Austrian Konkursordnung*, 10. 12. 14; Nussbaum, op. cit., § 68. 1, pp. 460, 461.

[3] Nadelmann ('The National Bankruptcy Act and the Conflict of Laws', in *Harvard Law Review*, 59, pp. 1029–31) strongly argues that by the combined operation of Sec. 70 (*a*) (5) and Sec. 7 (*a*) (5) of the United States Bankruptcy Act, 1898, a universal assignment, including foreign assets, is in law created. *Sed quaere* whether a foreign court which did not recognize the American bankruptcy would feel able to recognize as valid an assignment made by compulsion deriving its force from that very bankruptcy.

[4] See Cour de Cassation, 6 August 1852: *Pasicrisie*, 1853, Part 1, p. 146; *Belgique Judiciaire*, 1854, p. 161; 23 May 1889: *Pasicrisie*, 1889, Part 1, p. 229; *Dalloz*, 1891, Part 2, p. 226; *Clunet*, 1889, p. 891; Antwerp, 14 February 1903: ibid., 1905, p. 1088; Brussels, 26 November 1910: ibid., 1912, p. 575.

[5] Rolin, 'Des Conflits de lois en Matière de Faillite', in *Recueil des Cours de l'Académie de Droit International de la Haye*, 14 (1926) (iv), pp. 1, 29.

[6] von Bar, op. cit.

If, then, it is not necessarily inherent in the nature of bankruptcy either that it involves a universal assignment or that it affects the debtor's status, and so invokes his personal law, what connexion remains between bankruptcy and the maxim *mobilia sequuntur personam*?

3. *The debtor's domicil in relation to the maxim*

The problem arises when a debtor with movable assets in country A is declared bankrupt in country B. Prima facie, if the law of B is the debtor's personal law, and the courts of A recognize the bankruptcy as affecting the debtor's status and so invoking his personal law, the rule embodied in the maxim will entitle the debtor (or his trustee in bankruptcy claiming in his right) to have the law of B applied by the courts of A in relation to the debtor's movables in A. That is to say, the trustee appointed in B can recover the movable assets in A.

If, according to the law of A, the connecting factor in determining the debtor's personal law is domicil, then the debtor must be domiciled in B or the maxim has no application. Furthermore, he must be so domiciled in the sense in which domicil is understood according to the law of A. The scope for the application of the maxim to a bankruptcy is thus limited to cases in which the following conditions are fulfilled:

1. the law of A recognizes a foreign bankruptcy as being capable of affecting status;
2. B is the country of the debtor's domicil,[1] in the sense accepted by the law of A;
3. the law of A makes domicil the basis of personal law;
4. a bankruptcy, according to the law of B, purports (*a*) to affect the debtor's status, and (*b*) to catch his movables in A; and
5. the law of A recognizes the maxim as importing the law of B in the foregoing circumstances.

It is evident that the last word, as well as the first, rests with the law of A, the *lex rei sitae*. It is also evident that a preference given to the country of the domicil in the recognition of a foreign bankruptcy would be a rare occurrence if all the conditions necessary for the application of the maxim had in every case to be fulfilled. When, therefore, it is found that in widely differing systems of law the significance of domicil in relation to declarations of bankruptcy has been much debated, other grounds must be sought on which that significance rests.

Bankruptcy is in its origin, and to a great extent in its practical application, a commercial device; and bankruptcy laws are everywhere regarded as a branch of commercial law. On one view, it represents the penal aspect of the maintenance of credit, which is the very mainspring of commerce. Rolin, rejecting the theory that it is either a personal or a property law, characterizes it as a sort of 'commercial police law'.[1] In the French courts it has also been called a 'police law'.[2]

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[1] The possibility that nationality and not domicil may, according to the law of A, be the connecting factor in determining the personal law has not been overlooked. It has been disregarded, first, because, *mutatis mutandis*, the principle is the same, and secondly, because the *lex patriae* has never, so far as is known, been accorded special recognition in relation to bankruptcy. Everywhere bankruptcy has a commercial rather than a political affinity.

The conception of domicil, for its part, in spite of its nominal association with residence,[3] has acquired the coincident or concurrent meaning of the principal place of business. This is not surprising, for even to-day a trader commonly has his centre of business activity in the city or district, and more particularly in the country, in which he normally resides. So long, therefore, as domicil implies no more than this, it is natural enough that the place where the main business is carried on should also be, at least primarily, the place where commercial discipline should be applied. The domicil should determine the place of bankruptcy.

If that were the universal rule it would be easy to see how the maxim would fit into the general scheme. The argument would run quite plausibly: the domicil is the proper place of bankruptcy; the law of the domicil is therefore the proper law of the bankruptcy; the law of the domicil is also the personal law of the bankrupt;[4] bankruptcy catches all the bankrupt's movable assets;[5] where the personal law is concerned, *mobilia sequuntur personam*; therefore, where the coincident law of the bankruptcy is concerned the maxim applies, and the bankrupt's foreign movables fall with the rest into the bankruptcy.

This convenient way of putting the matter breaks down, however, on its preliminary assumption. It is not in fact the universal rule that domicil determines the place of bankruptcy. It is not even the universal rule that any one place (however determined) has the monopoly of bankruptcy, or indeed that there can only be one bankruptcy at a time. Controversy on this point has long raged and still rages between different systems of law, and even amongst jurists within the same system. On the one side are the advocates of the single and exclusive bankruptcy—the so-called principle of unity[1]; on the other, the champions of the possibility of multiple bankruptcies[2]—sometimes called the principle of territoriality, and sometimes (in France) plurality. As regards the latter school of thought, plurality of bankruptcies excludes on the face of it the monopoly of domicil; and even if the possibility of more than one contemporaneous domicil be admitted, the correlative notion of more than one personal law at any one time borders on a reduction to absurdity. It is only, therefore, by applying the principle of unity that any pretence of claiming for the country of the domicil a monopoly in declaring bankruptcy can be maintained. Even Rolin,[3] while maintaining the view that there should only be one bankruptcy and one estate to one debtor ('unity-universality') and that the country of the domicil should always be the proper place of the bankruptcy, is constrained to admit many important exceptions. What matters, however, for the present purpose is that the preference given to the country of the domicil is related, not to the special jurisdiction of its courts over the status of the debtor, but to commercial convenience.[4] This implies that the natural place for a bankruptcy to take place is where the debtor has the bulk of his business assets. In so doing, it would seem to ignore the maxim altogether; for if the maxim applied, the notional whereabouts of the movable assets would override their physical situation, and whether they happened to be in the country of the bankruptcy or not would merely be a matter of practical convenience. Juridically speaking, it would be irrelevant.

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[1] 'C'est essentiellement une loi de police économique, et lorsqu'il s'agit de la faillite de commerçant une loi de police commerciale.' Rolin, op. cit., pp. 29, 34.

[2] 'La loi sur les faillites étant une loi de police et d'ordre public, la déclaration de faillite d'un étranger peut être provoquée par un autre étranger.' Paris, 2 May 1878 (*Sirey, Recueil général des lois et des arrêts* (1880), 2, p. 193; *Journal du Palais* (1880), p. 789).

[3] French *domicile*; German *Wohnsitz*. But a distinction is sometimes made between a 'civil' and a 'commercial' domicil, though usually within the same state. For an analysis of the French view of domicil see Lorenzen, 'The French Rules of the Conflict of Laws', in *Yale Law Journal*, (1927) 36, p. 731; (1928) 37, p. 849; (1929) 38, p. 165, see esp. at p. 173.

[4] Where the *lex patriae* is the personal law, this would not, of course, be true where the bankrupt was domiciled elsewhere than in the country of his nationality. But the prevalence of the *lex patriae* is a comparatively modern development, and the argument belongs to earlier times and to a commercial, not a political, point of view.

[5] It is unnecessary to postulate an actual assignment for the purpose of this reasoning.

4. *English bankruptcy law and the maxim*

When the principles of English law relating to bankruptcy and to the conflict of laws are carefully considered, it is surprising that the maxim should ever have been applied in bankruptcy cases at all. The English courts have never recognized as a bankruptcy, with all its implications affecting the rights of third parties, what purports to be a bankruptcy declared in a court of a foreign country. For several centuries the trustees (or their equivalent) appointed by a foreign court to administer an insolvent estate have been permitted to make a title in England to movable assets belonging to the debtor's estate.[5] The right, however, upon which they are permitted to do so remains obscure. Whether the English court professes to give effect to what it regards as a valid assignment, and if so, whether it intends in effect to enforce the equivalent of a contract, or to regard the foreign 'trustee' as the debtor's successor in title and, in so doing, apply the maxim *mobilia sequuntur personam*, or whether, on the other hand, no more is intended than to act in accordance with the comity of nations, and in any case whether the claim is enforced as a matter of right or purely as one of discretion, remains an issue upon which no authoritative pronouncement has ever been made.

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[1] Rolin, op. cit., pp. 5 ff.

[2] *Blake* v. *Williams* (1828), 23 Mass. 286; *Disconto Gesellschaft* v. *Umbreit* (1906), 127 Wis. 651, affd. (1907), 208 U.S. 570; *Fincham* v. *Income from Certain Trust Funds of Cobham* (1948), 81 N.Y.S. 2d, 356.

[3] Rolin, op. cit., pp. 40–3, 49–52, 145–7.

[4] Ibid., pp. 40–3.

[5] In a case instituted in England in 1610–11, and reported under the name of *Seve and Eland contra Colley* (Tothill 68, 9; 21 E.R. 125, 6) the further proceedings in which are recorded by Monro in *Acta Cancellariae* (1847), pp. 168, 9 (*sub nom. Seve* v. *Colly*), the representative of French creditors was allowed to follow assets which an Italian debtor had fraudulently transferred to England. The record includes diplomatic representations made personally by the French Ambassador to King James I, from which it may be inferred that the Lord Chancellor was acting pursuant to the comity of nations rather, it may be, than to any settled legal principle. In a very

The truth may well be that, the practice having once established itself, it has been consistently followed for no better or other reason than that. If this, however, be the case, then assuming the practice to have been originally well founded in law, it would only remain on firm ground so long as the law affecting it continued unchanged. Let it be supposed that in the eighteenth century Lord Loughborough's 'clear proposition' that 'personal property has no locality'[1] prevailed in relation to bankruptcy law. Then, either the foreign debtor[2] was declared bankrupt in the foreign country of his domicil, and (by virtue of the maxim) his movables in England were caught by the declaration as though they had been in that foreign country; or he was declared bankrupt in some other foreign country. In the latter event, the English court might recognize the foreign declaration as having the effect of a contract by the debtor to give up his property, but not as of itself passing the title to property outside the jurisdiction of the foreign court; unless indeed the law of the debtor's own domicil would recognize it as so doing. Only in that way could the maxim apply.

On the assumption of Lord Loughborough's proposition, therefore, domicil is the essential element in imparting potentially to a bankruptcy declared in the appropriate country the quality of effecting a transfer of title to movables situated abroad, a quality not possessed by any other foreign declaration of bankruptcy.

Such an incidental quality (if in truth it has ever existed) is, however, something totally different in kind from the special merits of the country of the domicil according to the notions prevalent in the civil law countries.

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brief report of the reign of Charles I (the precise date is not known) *sub nom. Wild contra Middleton* (Tothill 75; 21 E.R. 127, 8) there is a reference to the Court of Chancery having entertained some proceedings in a bankruptcy notwithstanding that the bankrupt and the creditors 'dwell out of England in Galicia'. See, too, *Solomons* v. *Ross*, 1 H.Bl. 131 n.; 126 E.R. 79; Wallis-Lyne, Irish Ch. Rep. 59 n., and Nadelmann, 'Solomons *v.* Ross and International Bankruptcy Law', in *Modern Law Review*, 9 (1946), p. 154.

[1] 1 H.Bl. 665, 690. See p. 177, n. 1, *ante*. But cf. Lord Loughborough's own comment in *Folliott* v. *Ogden*, 1 H.Bl. 123, 132, that he was counsel in the case of *Solomons* v. *Ross*, which was decided solely on the principle that the assignment of the bankrupt's effects to the curators of desolate estates in Holland was an assignment for a valuable consideration, and therefore acknowledged in this country.

[2] That is to say, the debtor declared bankrupt otherwise than in England.

It is the identity of the domicil with the seat of business activity[1] which gives it its intrinsic relevance in relation to bankruptcy, where bankruptcy itself is confined to traders. So that in a civil law country there is a tendency to recognize a bankruptcy declared in the country of the debtor's domicil because that is the appropriate place of bankruptcy; whereas it could be argued that the only merit of such a bankruptcy in England in the eighteenth century would, on the supposition under discussion, have been that if it purported to effect a transfer of movable assets in England, there was some ground in English law for claiming recognition, not of the bankruptcy, but of the transfer. The supposition, however, that the English courts ever accepted that argument so expressed is entirely without authority. What seems much more probable is that since, at that period, bankruptcy in England, as in other countries, was limited to traders,[2] English judges also regarded the country of the domicil as the only proper foreign country in which a bankruptcy with extraterritorial effect could be declared. In such case (and it must be conceded that there is no authority for any such proposition either) the application of the maxim in order to clothe with validity a transfer of the English movable assets was no more than a convenient incident. In any event, with the extension of bankruptcy in England to non-traders, the special appropriateness of the country of the domicil ceased altogether so far as foreign declarations of bankruptcy were concerned.

Nor was that extension the only reason why that should be so. The conception of domicil itself in England was steadily being discovered to be materially different from its civil law counterpart. Instead of the emphasis being on physical presence constituted by residence or business activity, what was stressed was a state of mind, the intention of the *propositus*. A man might live and die in one country, and yet be held to have been domiciled in another from which he had been absent for a great many years.[3] He might even make one country the seat of his activities as well as his usual place of residence, and yet be domiciled in the country of his origin.[4] Such an extended idea of domicil, divorcing it altogether from its commercial significance, destroyed, it is submitted, the last possible reason why English law should give any preference to the country of the domicil as being more appropriate than any other for a declaration of bankruptcy. It could only do so by a kind of inverted use of the maxim; by arguing that since a valid transfer of extraterritorial movables could only be effected by the law of the domicil, that law alone would be competent to make a debtor effectively bankrupt as to such movables. But that assumes, first, that the

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[1] See e.g. Art. 102 of the French Civil Code: 'The domicile of every Frenchman as to the enjoyment of his civil rights is at the place of his principal establishment.'

[2] It was not extended to non-traders until 1861. See Bankruptcy Act, 1861, 24 & 25 Vict., c. 134.

[3] See e.g. *Ramsay* v. *Liverpool Royal Infirmary*, [1930] A.C. 588.

[4] See e.g. *Winans* v. *Attorney-General*, [1904] A.C. 287.

lex domicilii purports to transfer such movables; secondly, if it does so purport, that it would prevail over the *lex situs*; and thirdly, that its declaration commands recognition as something affecting the debtor's status. As no one of these assumptions is necessarily correct, and as the second and third are contrary to English law,[1] that ground too for preferring the domicil as the proper place of bankruptcy falls away.

In those circumstances it is remarkable that the confused thinking into which the maxim seems at least in part to have been responsible for misleading the English courts, should have resulted in judicial uncertainty lasting over half a century before those courts muddled through (for the wrong reasons, it is submitted) to the conclusion that domicil was irrelevant in determining what effect a foreign declaration of bankruptcy should have upon a claim to the debtor's movable assets situated in England. Where the foreign bankruptcy was not complicated by any competing English claim, the question seems never to have troubled the courts. Simply following what they assumed to be the effect of *Solomons* v. *Ross*,[2] the courts in England generally accorded sympathetic recognition to the claims of the foreign 'trustee'.[3] It was when there was an English claimant through the debtor, whether a trustee in bankruptcy, executor or settlement trustee, that the courts began to express doubts as to whether the debtor's domicil had or had not a bearing on the prevalence of the foreign 'trustee's' claim. The underlying question evidently was whether the maxim did or did not operate so as to bar the English claimant's title to the debtor's movables in England.

5. *Elimination of the maxim from English bankruptcy law*

The process of elimination began in 1866. It arose out of proceedings raising directly the question whether, in the case of a bankruptcy declared abroad, the debtor's domicil, and if so in what sense, governed the alienation of his property.

Lord Romilly M.R. held in *In re Blithman*[4] that it did so, though not precisely why. An Englishman was declared insolvent in South Australia in 1863. It was not clear whether at that time he was domiciled in England or in South Australia. In 1864 he died, leaving a reversionary interest in a trust fund of personalty in England. On the interest falling into possession it was claimed both by the assignees under the South Australian insolvency and by his executrix. The answer was held to depend entirely on his domicil. If it turned out to be Australian, the assignees were entitled to take the property. If it was English, then it would belong to the executrix, subject to a possible right of action by the assignees, as on a foreign judgment, to recover it for the insolvent estate. The Master of the Rolls said in the course of his judgment:[1]

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[1] See *ante*, pp. 178–80 and 183–4. It might further be urged that the purely artificial personal law which a husband who changes his domicil can, in English law (see, for example, *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444, 460), foist upon even a deserted wife, would render completely inept the application of the *lex domicilii* to the title to movables in every foreign bankruptcy of a married woman.

[2] 1 H.Bl. 131 n. See *ante*, p. 186, n. 5.

[3] See *Macaulay* v. *Guaranty Trust Co. of New York* (1927), 44 T.L.R. 99, where Clauson J. held that receivers appointed by a foreign court enjoyed in England, by the comity of nations, all the rights which their appointment gave them in their own country.

[4] (1866), L.R. 2 Eq. 23.

> '. . . where a person domiciled in this country has contracted debts abroad, upon which a foreign judgment has been obtained, the judgment creditor abroad must, on his decease, sue his legal personal representative in this country for the purpose of recovering upon that judgment. Various questions may thereupon arise. He is not entitled to take away the whole of the fund, but questions of priority, questions of other judgments, and other considerations may arise; they may be entitled to be paid *pari passu*, or the executor may be entitled to contest the foreign judgment, or the like.'

This decision was considered and commented on in a later case[2] which will presently be noticed; but in the meantime it is to be observed that Lord Romilly put an adjudication in bankruptcy, declared otherwise than in the country of the debtor's domicil, on the same footing as a judgment for a debt, without making the distinction that while the latter professes only to be binding *inter partes*, the former purports to affect the rights and interests of persons not before the court and indeed not necessarily within the jurisdiction of the court or even willing to submit to that jurisdiction. His reasoning, therefore, does not seem satisfactorily to apply to a case of bankruptcy; unless, indeed, he meant that the bankruptcy abroad of a person domiciled in England takes effect in England as a foreign judgment for debt and no more. But that seems to conflict with the principle in *Solomons* v. *Ross*,[3] and raises the question as to the effect in England of the bankruptcy of a foreigner in the forum of his own domicil. Is it to be entitled to full recognition as a bankruptcy? If not, what relevance has domicil?

Some seven years later, in 1873, James L.J., sitting for Wickens V.-C. as a judge of first instance, held in *In re Davidson's Settlement Trusts*[4] that domicil was immaterial. The bankruptcy there had taken place in Queensland in 1866. Again the bankrupt's domicil, whether in England or in Queensland, was undetermined. Under his parents' English marriage settlement the bankrupt was entitled to one-fifth of the fund, which fell in in 1869, and was paid into court in England. In 1868, before the share fell in, the bankrupt was discharged, with unsatisfied debts of £5,000, a sum well in excess of the share which was later paid into court. In the same year he died. In due course the Queensland Official Assignee claimed the fund in court, and his claim was upheld. The process of reasoning by which this result was arrived at was that it was not open to the representative of the debtor (who presented his own petition) to challenge the Queensland insolvency. Since the debts exceeded the amount available, neither the insolvent's representative nor the next of kin had a right to receive anything, for their rights would arise only after all the debts had been paid. In those circumstances domicil made no difference. 'I may add', said James L.J.,[1] 'that it would be impossible to carry on the business of the world if Courts refused to act upon what had been done by Courts of competent jurisdiction.' Having regard, however, to the peculiar facts of this case, and to the estoppel which they were regarded as raising, the decision cannot be looked upon as a satisfactory authority on the question whether domicil is relevant in determining how far (if at all) a foreign bankruptcy operates as an effective assignment.

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[1] (1866), L.R. 2 Eq. 26.

[2] *In re Anderson*, [1911] 1 K.B. 896. See p. 194, *post.*

[3] 1 H.Bl. 131 n. The principle seems to be that the English court will assist the trustee, in a bankruptcy declared in any foreign court of competent jurisdiction, to collect the bankrupt's movables in England.

[4] (1873), L.R. 15 Eq. 383.

The next important decision on the subject was given in 1890; and again the relevance of domicil was left undecided. It was the case of *In re Artola Hermanos*,[2] which came before Lord Esher M.R., Lord Coleridge C.J., and Fry L.J., sitting in the Court of Appeal. The debtors were members of a firm of Spanish domicil of origin, trading in France, England, and Spain. Their present domicil was not ascertained. The first bankruptcy occurred in France. Subsequently a receiving order was made in England. The French Syndic then applied to the English court for rescission of the receiving order or, alternatively, a stay of the English proceedings, and delivery up to him of the English assets. Rescission the court refused to grant, on the simple ground that there was clear jurisdiction under the Bankruptcy Act, 1883, to make a receiving order, regardless of a prior bankruptcy abroad. As to a stay, this was held to be a matter of discretion. In the absence of evidence establishing a domicil elsewhere than in England, the Court found no reason for interfering with the exercise by the inferior court of its discretion in favour of an English bankruptcy. The *ratio decidendi* was purely negative. There was no question of the domicil being in fact English: nor was it held, by any means, that the domicil was immaterial. All that was decided was that as the actual domicil was not proved, there was no foreign law indicated which the court should apply in preference to English law. The importance, or possible importance, of domicil was discussed in the judgments.

> 'There is no doubt', said Coleridge L.C.J.,[3] 'that the double bankruptcy occasions double costs, and brings with it many inconveniences which were pressed upon us in argument, and the force of which I am very far indeed from denying; but I can find no substantial ground—no legal ground—for interfering in a way which, as far as all the

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[1] L.R. 15 Eq. 383, 386.

[2] (1890), 24 Q.B.D. 640.

[3] Ibid., at pp. 644 ff.

cases which have been brought before us are concerned, has never been done in this country. The only cases in which the Courts intimate that they would do this, if necessary, or rather intimate the ground upon which it would be legal to found such an application, and to continue it to a successful issue in these Courts, are where there are two bankruptcies going on, and one of them was going on in the country of the domicil of the bankrupt. The Scotch case, *Stein's Case*,[1] to which we were so fully referred, was a case recognised distinctly afterwards in the House of Lords, and therefore the principles of it are principles upon which we are justified in acting. . . . The whole matter is put upon the question of domicil, and it is said that, upon the well-known and established ground that by fiction of law personal property has no locality, but follows the locality of the person to whom it belongs, where there is personal property in two countries, and where therefore it becomes a question of conflict to which of the localities, either of which might be ascertained as the place where the owner of the property is located (I use that word purposely), these proceedings should pertain, and if it is necessary that there should be but one proceeding in bankruptcy, that proceeding should be in the country of the domicil. Now that is a convenient rule—a rule expanded beyond perhaps what was necessary in the judgment of Lord Westbury in *Enohin* v. *Wylie*.[2]. . . This only will I say, that if Lord Westbury's doctrine is right it is a very convenient doctrine; but whether it would stand the test of further investigation, and be received in the highest Court of Appeal in this country, may be, after the judgments of Lord Selborne and others in *Ewing* v. *Orr-Ewing*,[3] a very great question.'

That the test of domicil represented only one of three possible views as to the proper method of solving the problems arising out of concurrent bankruptcies in different countries was fully expounded by Fry L.J. in delivering judgment in the same case.[4] After pointing out that one view was that each forum was to administer the assets locally situated within its jurisdiction for the equal benefit of all creditors, wherever resident, and after critically examining that view, Fry L.J. proceeded:

'Another rule which has been suggested is this, that every other forum shall yield to the forum of the domicil, that the forum of every foreign country, every country not of the domicil, shall act only as accessory and in aid of the forum of the domicil. That, it is said, is the *forum concursus*, to which all persons who are interested in the administration of the estate are bound to have recourse. No doubt there is a great deal in point of law and principle to be said in favour of that view, and there are certainly some conveniences in it. . . . Then there is a third view . . . that the forum of the country in which the debtor has assets and which first adjudicates him bankrupt, although it be not the forum of the domicil, is entitled to claim the assets from the tribunals of other countries in which he has assets. That doctrine appears to me to be an entirely unreasonable one. There is this broad difference between yielding to the forum of the domicil and yielding to the forum of the first country which happens to pronounce a man bankrupt:—personal property is said to follow the person, and from that it follows that the forum of domicil has, by what has been sometimes called a fiction of law, a right by judgment against a bankrupt to divest him of all personal property and vest it in his assignees, and by the fiction to which I have referred that judgment, pronounced by the forum of the domicil, is said to have universal validity, and to be capable of transferring personal property locally situate beyond the jurisdiction of that forum. The forum, not of the domicil but of the country in which the debtor may have assets, has no such right to claim universal obedience to its judgment; it has no right to pronounce a judgment which will extend beyond the personal assets locally situate within its jurisdiction.'

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[1] 1 Rose, 462.

[2] 10 H.L.C. 1.

[3] 9 A.C. 34.

[4] 24 Q.B.D. 640, 648 ff.

Referring further and with disparagement to the principle that every other forum must yield to the forum of a country in which there are assets and which first pronounces the bankruptcy, Fry L.J. continued:

> 'But then it is said that *Stein's Case*[1] proceeds on that principle. . . . I do not conceal from myself that there are difficulties in that case. It is not easy to see what were the facts on which the Court arrived at the conclusion with regard to the domicil at which they did arrive. Further, it would appear that the Scotch Court considered, and for aught I know considered rightly according to Scotch law, that a firm of merchants has a domicil as a firm, and they seem further to have considered that a firm is capable of having two domicils, and they chose between the two domicils only by priority of adjudication. But nevertheless the case proceeds upon this main principle, that the Court of the domicil has the right to pronounce a universally valid judgment with regard to the personal property of the bankrupt. That proposition underlies the decision, and whatever difficulties there may be in the application of it do not detract from it.'

So near in 1890 did the English courts, by clinging to the test of domicil, come to applying the maxim *mobilia sequuntur personam*, and even to embracing the principle of unity;[2] and more than another twenty years were to pass before they began positively to turn away from this direction. In the meantime the uncertain state of the law was illustrated in two other decisions. In 1895, North J., in *In re Lawson's Trusts*,[3] heard a petition by the Official Assignee of an Indian court in which a deceased debtor had been made bankrupt, for an order for payment out to him of a posthumous legacy, the amount of which had been lodged in court in England. The Judge followed *In re Davidson's Settlement Trusts*,[4] and made the order as prayed without even inquiring into the question of domicil. This looks at first sight like a departure from the principle indicated by the Court of Appeal in *In re Artola Hermanos*.[5] The reconciliation is, however, to be found in the fact that the debtor was declared insolvent in India on his own petition. It was accordingly not open to anyone claiming through or under him to dispute the effectiveness of the Indian insolvency to pass his entire estate. The argument was thus the same as that which prevailed with James L.J. in the case which North J. followed. On that footing the contrary decision of Kekewich J. in *In re Hayward*[6] is also consistent. There the debtor had a protected interest under certain will trusts in England, subject to determination upon bankruptcy. He was in fact made bankrupt in New

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[1] 1 Rose, 462.

[2] The view that there should be only one bankruptcy and one estate to one debtor anywhere in the world at one time. See pp. 185–6, *ante*.

[3] (1896), 1 Ch. 175.

[4] L.R. 15 Eq. 383.

[5] 24 Q.B.D. 640.

[6] (1897), 1 Ch. 905.

Zealand in his absence from that Dominion, and although the bankruptcy was meanwhile annulled, the question arose as to whether it had taken effect so as to defeat the protected interest. There was no question in that case of any estoppel binding the debtor, who had never submitted to the jurisdiction of the New Zealand court; and Kekewich J. regarded himself as bound to follow *In re Blithman*,[1] and apply the test of domicil as the sole criterion. Since the debtor was found never to have lost his English domicil, it followed that the New Zealand proceedings were ineffective to bind his English property, and accordingly the will trusts in his favour were held not to have been defeated. That, however, was the high-water mark of the domicil test in relation to foreign bankruptcies.

The turning-point came in 1911, with the decision in *In re Anderson*.[2] This was an important case in more than one respect, and the subtle twist by which it changed the direction in which the courts seemed, up to that point, to be moving, is perhaps best understood against that background of foreign law to which some reference has already been made. Phillimore J., before whom it was heard, had behind him a family tradition as an international jurist, which clearly influenced his thinking. He also had the advantage (or disadvantage) of having been engaged as counsel on the losing side in *In re Davidson's Settlement Trusts*,[3] which (on his own reinterpretation) he felt obliged to follow. Here again there was a New Zealand bankruptcy, and a reversionary interest in England. This time, however, there was a subsequent English bankruptcy. The reversionary interest, to which the debtor had been entitled at the dates respectively of both bankruptcies, had through inadvertence not been disclosed in either. Its existence was discovered at a late stage by the English trustee in bankruptcy, who thereupon took prompt steps to realize it. The Official Assignee in Bankruptcy of New Zealand then claimed the proceeds; and the question was as to who was entitled to take them.

Phillimore J. upheld the claim of the New Zealand assignee, and in so doing professed to follow *In re Davidson's Settlement Trusts*[4] and *In re Lawson's Trusts*,[5] and to distinguish *In re Blithman*[6] and *In re Hayward*.[7] For the purposes of the case he assumed that the debtor had an English domicil, and he arrived at the conclusion that domicil was immaterial, not only on some ground of estoppel, but absolutely. He was prepared to disregard as virtually irrelevant the circumstances, in each of the two cases which he followed, that the debtor had himself invoked the jurisdiction of the foreign court and could therefore not be heard (even through his trustee in bankruptcy or by his personal representatives) to dispute that

[1] (1866), L.R. 2 Eq. 23.

[2] [1911] 1 K.B. 896.

[3] (1873), L.R. 15 Eq. 383.

[4] Ibid.

[5] [1896], 1 Ch. 175.

[6] (1866), L.R. 2 Eq. 23.

[7] [1897], 1 Ch. 905.

jurisdiction. As regards the two cases[1,2] mentioned which he distinguished, notwithstanding the express application by the court of the test of domicil, Phillimore J. felt able to limit this application to the right only of the English representative to collect the assets without prejudice to their ultimate destination. He assumed that after certain outgoings had, in each case, been discharged, it would be the trustee in the foreign bankruptcy who would eventually receive the assets, notwithstanding the failure of his direct claim in the proceedings before the court. To some extent this reasoning seems to have been based on the dictum (already cited above)[3] of Lord Romilly M.R., '. . . where a person domiciled in this country has contracted debts abroad, upon which a foreign judgment has been obtained, the judgment creditor abroad must, on his decease, sue his legal personal representative in this country for the purpose of recovering upon that judgment'.[4] If, however, that is the right of the foreign trustee which is relied on as justifying the court in handing over the assets in England in the first instance to a rival claimant, then it is respectfully submitted that there are two flaws in the argument. First, as has already been observed,[5] an adjudication in bankruptcy is not strictly comparable with a judgment for debt so as to entitle the foreign trustee to enforce it as of right in England. Secondly, Lord Romilly's reservation was limited to the judgment creditor of 'a person domiciled in this country'. Thus domicil refuses to be driven out with a pitchfork; and this dilemma results. Either the debtor has an English domicil, in which case the foreign trustee has to discharge the burden of establishing that he enjoys in England the rights of a foreign judgment creditor; or the debtor has not an English domicil, in which case (paradoxically) the foreign trustee has, according to Lord Romilly's limitation, no *locus standi* in the English courts, once his English rival has been allowed by the courts to take the property. In either case, therefore, domicil is a material fact.

A careful study of the judgment of Phillimore J. in *In re Anderson*[6] reveals that at the back of his mind were doctrines borrowed from foreign law. He went out of his way (though 'without deeming it necessary to draw any conclusions in this case from it') to refer to the opinion expressed by Sir Robert Phillimore in his *Commentaries on International Law*—a work which he also cited to the Court when appearing in *In re Davidson's Settlement Trusts*[7]—to the effect that for the purposes of the weight to be attached to the claim of a trustee in bankruptcy by reason of the bankrupt's having been domiciled or not domiciled in the country where he is adjudicated bankrupt, a 'commercial domicil' may suffice.[8] Now, not only does this observation, if it is to carry any force at all, conflict with the learned Judge's

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[1, 2] See notes 6 & 7 on p. 194.

[3] *Ante*, p. 190.

[4] (1866), L.R. 2 Eq. 23, 26.

[5] *Ante*, p. 190.

[6] [1911] 1 K.B. 896.

[7] (1873), L.R. 15 Eq. 383.

[8] [1911] 1 K.B. at pp. 899, 900.

own proposition that domicil of any kind is neither here nor there, but it seems gratuitously to import into English law an element that is foreign to its conceptions. Westlake[1] (or his learned editor), it is true, has fastened upon this very dictum as authority for his own view that 'commercial domicil' affords a sufficient basis for jurisdiction in bankruptcy. But there seems to be no English case in which such a conception has been judicially construed in relation to the conflict of laws. The doctrine of 'commercial domicil' is well understood as a principle of public international law, determining the status of a trader in time of war as friend or enemy according to whether or not he carries on business in enemy territory or in territory from which his commercial activities can benefit the enemy.[2] But no justification is apparent for the importation of such a doctrine into private international law. Nor is it thinkable that Phillimore J. ever intended to do so. Even by analogy its introduction would be inapt; for, quite apart from the fact that it only becomes effective in time of war, there is the further element that 'commercial domicil' may be and often is multiple. 'A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries.'[3] But if 'commercial domicil' may be the determining factor in founding jurisdiction in bankruptcy entitled as against all the world to be recognized as affecting (where it professes to do so) a universal *cessio bonorum*, it would be difficult, if not impossible, to apply wherever the debtor had more than one such domicil. It is therefore suggested that what Phillimore J., and probably Sir Robert Phillimore before him, had in mind in importing 'commercial domicil' as a concept into English private international law was something analogous to the continental ideas whereby the foundation—or at least a familiar foundation—of bankruptcy jurisdiction was the maintenance by the debtor of his principal place of business within the territorial jurisdiction of the *forum concursus*.[4] In countries such as France, where bankruptcy is limited to traders, and where consequently the bulk of the debts will have been incurred on the credit of assets situated at the principal place of business, the test of 'commercial domicil' (in the sense just mentioned) is often sounder and more logical than a pedantic insistence on civil domicil, which might well carry the jurisdiction to a country in which there are actually or virtually no assets at all. Or again in Germany, where there may be concurrent bankruptcies if residence and 'seat' of trading do not coincide, 'commercial domicil' (in a still looser sense) is a possible foundation of jurisdiction in bankruptcy. But to English law, in which trading is no longer a material factor in bankruptcy,[1] and in which successive obligations anywhere incurred, and not simultaneous obligations incurred in different places, may result in concurrent bankruptcies, the situation of a debtor's place of business (if any) has no decisive significance, and the conception of 'commercial domicil' in relation to bankruptcy jurisdiction is altogether foreign.

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[1] Westlake, *Private International Law* (7th ed., 1925), p. 176.

[2] See *Tingley* v. *Müller*, [1917] 2 Ch. 144, 173, *per* Scrutton L.J.; *The Anglo-Mexican*, [1918] A.C. 422; *The Lützow*, [1918] A.C. 435.

[3] *The Jonge Klassina* (1804), 5 C.Rob. 297, 302, *per* Lord Stowell; and see the judgment of the Privy Council in *The Lützow*, [1918] A.C. 435, 438. See also Cheshire, *Private International Law* (3rd ed., 1947), pp. 240–3.

[4] See *ante*, p. 185.

Nor was this the only importation of foreign ideas by Phillimore J. in the course of his judgment in *In re Anderson*.[2] In support of his view that the rejection of the claims of the foreign assignees in bankruptcy in *In re Blithman*[3] and *In re Hayward*[4] meant no more than that the English personal representative had a cleaner prima facie title, subject to the right of the foreign assignee subsequently to make good his claim to the assets in the personal representative's hands, the learned Judge said:[5]

> 'There is a passage in Sir Robert Phillimore's Commentaries[6] in which he refers to Story's way of dealing with the position taken by the Courts of the United States with regard to foreign bankruptcies. It indicates, I think, the sort of consideration that may be applied to these cases. Continental jurists would have no difficulty in understanding that which it is a little difficult to express in terms of English law; they know cases of foreign judgments which require in their language homologation by the native Court before they can have their full effect. Something of the same kind may apply in the case of all foreign bankruptcies, or at any rate of foreign bankruptcies where the debtor is not domiciled in the country where he is made bankrupt. The title is not as perfect, or at any rate as direct, as it would be in the case of an English bankruptcy, and on that ground it may be that *In re Blithman*[7] and *In re Hayward*[8] are rightly decided.'

These observations in effect attribute to Lord Romilly and to Kekewich J. a juristic objection to giving direct effect to a foreign judgment unless and until it has been made executory by something in the nature of *exequatur*. Looking back at the judgments of these two learned Judges, considering their respective personalities, and above all in view of the fact that in each of the two cases domicil expressly afforded the ground for the decision, such a suggestion does seem to border on the extravagant. It is indeed as though Phillimore J., in the judgment in *In re Anderson*,[9] was, as it were, thinking aloud, with doctrines of foreign law circulating in his mind. While rejecting the application of the test (already virtually, if precariously, established) of domicil to bankruptcy jurisdiction, he digressed to introduce the proposition that even 'commercial domicil' might found such jurisdiction. Declaring that the recognition by the debtor of his foreign bankruptcy

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[1] Its last vestiges, as applying to married women, were obliterated by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 1 (*d*).

[2] [1911] 1 K.B. 896.

[3] (1866), L.R. 2 Eq. 23.

[4] [1897] 1 Ch. 905.

[5] [1911] 1 K.B. 896, 901.

[6] 3rd ed., vol. iv, pp. 621, 622.

[7] L.R. 2 Eq. 23.

[8] [1897] 1 Ch. 905.

[9] [1911] 1 K.B. 896.

'may be of some importance', the learned Judge expressly declined to decide the case upon that ground—presumably the ground of estoppel. Speaking a little later of the admission by the bankrupt of the jurisdiction of the foreign court, he said he thought it was not of importance.[1] Yet, at another point in his judgment, he said: 'If he' (i.e. the bankrupt) 'had not been a party to the adjudication, if it had been made against him in his absence, other considerations might very well have applied; but he certainly was a party to the adjudication, though he did not invoke it. . . .'[2] Apart from the difficulty of reconciling these various reflections (for they were no more, having regard to the eventual ground of decision), it is not easy to follow the logical train of thought. If a domiciled Englishman invokes a foreign bankruptcy by presenting his own petition, it is sound English legal principle that he cannot afterwards be heard to pray in aid his English domicil in order to defeat the effect in England of that bankruptcy. But where he has been made bankrupt abroad on adverse proceedings, the mere fact that he has applied in the foreign court for his discharge or has otherwise recognized the force of that bankruptcy within the jurisdiction of the *forum concursus*, should not, it is submitted, prejudice any rights he may have to set up in England the fact of his English domicil; for the English law will never presume to deny the force of a foreign bankruptcy within the jurisdiction of the foreign court by which it was declared. Phillimore J., however, without noticing any such distinction, and having held, 'if it is of importance', that the bankrupt would be estopped from denying the jurisdiction of the foreign court to treat him as though he had the appropriate domicil,[1] went on[3] to propound another remarkable doctrine. He likened a foreign bankruptcy to 'a very carefully drawn assurance' for the purpose of enabling a man who was prevented from incumbering his interest nevertheless to bind himself to deal with it after he had received it. The effect was to be that his personal representative would be entitled to receive the interest without any forfeiture attaching, and to apply it, subject to charges, for the use of his foreign incumbrancer, the trustee in his foreign bankruptcy. Exactly what the learned Judge found in the nature of the foreign bankruptcy that was equivalent to the necessary very careful draftsmanship does not appear. Nor does it seem to make it any clearer when he proceeds at once to introduce his reference to the foreign practice of homologation of foreign judgments; unless the suggestion be that the imperfect title created by such foreign judgments in the eye of the English court in some way saves the assurance which they purport to effect from operating as a forfeiture of the protected interest in England.

If that is indeed the suggestion, then it seems impossible to reconcile it with the final conclusions of the learned Judge, which he expressed in language that was both plain and in conformity with well-settled principles of English bankruptcy law. These were his words:[1]

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[1] [1911] 1 K.B. 900.

[2] Ibid., at p. 902.

[3] Ibid., at p. 901.

> 'Therefore, I think, upon principle and authority, that the adjudication in New Zealand, being a valid adjudication according to the law of New Zealand, passed the right to movable property of the bankrupt in any country to his official assignee in bankruptcy in New Zealand. . . . In the present case, if the New Zealand bankruptcy passed as against the debtor all his movable property wherever situate, it passed it equally against all persons claiming under later titles from him, such as an executor, an incumbrancer, an assignee for value, or even an official trustee or assignee in bankruptcy. Therefore this equitable reversion with which I have to deal had ceased to be the bankrupt's, and was no longer part of his assets when the second bankruptcy supervened. Therefore it did not pass to the trustee in the second bankruptcy.'

Yet, having said all this, Phillimore J. thought it necessary in the succeeding paragraph of his judgment[2] to revert to the theory of the imperfect title in an attempt to reconcile or explain the decision in *In re Artola Hermanos.*[3] He said:

> 'I would like, before I leave this question, to point out that in *In re Artola Hermanos*,[3] and cases of that kind, the Court deals, perhaps not quite logically but very sensibly and practically, with cases of concurrent or contemporaneous bankruptcies without much regard as to which bankruptcy was by a few days the earlier of the two. Where both bankruptcies are running, the estate has to be got in. And, at any rate, for the purpose of *colligenda bona*, it may be quite proper to have two bankruptcies running, one in this country and another in some foreign country. In those cases the Court by upholding the title of the trustee in the English bankruptcy does not mean, as Lord Coleridge clearly pointed out, to decide the ultimate right to the assets. It merely gives a title *ad colligenda bona*.'

This is completely unorthodox bankruptcy law. One thing against which, as a matter of policy, the English court firmly sets its face is the declaration of purely ancillary bankruptcies; and it is hard to conceive how Phillimore J. can have read a departure from this policy into the purely negative observations of Lord Coleridge,[4] declining even to suggest what might be the governing law of the distribution of the assets. The question was not before the court in that case, and had it been so, the law was clear as to the proper mode of distribution of assets collected by the trustee in any English bankruptcy.

In any event, Phillimore J., having once again digressed in order to deal with an issue that was not directly involved in the case which he was trying, returned finally to orthodoxy. In connexion with a point as to the effect on the right to an equitable interest of priority of notice given by one of two competing trustees in bankruptcy, he said:[5]

> 'The trustee in bankruptcy only takes what the bankrupt has to give him. If the

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[1] [1911] 1 K.B. 896, 902.

[2] Ibid., at p. 903.

[3] 24 Q.B.D. 640; see *ante*, p. 191.

[4] 24 Q.B.D. 640, 646.

[5] [1911] 1 K.B. 896, 903.

> bankrupt has incumbered his estate he takes it subject to equities. If the bankrupt has passed away a portion of his estate, he only gets the rest; if he has passed it all away, he gets none. If this reversionary interest had not been required in the first bankruptcy, it might be that the trustee in the second bankruptcy would get it. But this is not a case of two separate incumbrancers or assignees for value. It is not like it in principle or in reason.'

Gone, therefore, is the suggestion that the foreign trustee in bankruptcy is in the position of a mere incumbrancer with a title to be perfected. Gone already is the idea that the English court will 'very sensibly and practically' deal with contemporary bankruptcies by upholding the title of the trustee in the English bankruptcy *ad colligenda bona*, and leaving the foreign trustee to his remedy in the course of distribution of the estate. For it was the foreign trustee whose direct title Phillimore J. upheld, and that to the total exclusion of the interest of the English trustee who, in fact, had been the first to stake his claim.

Thus in spite of the various alien and inconsistent doctrines amongst which the learned Judge picked his way, he did eventually arrive at no very startling or novel conclusion. The one significant change in the law which emerged from the judgment was the rejection of domicil as a test of the effectiveness in England of a foreign declaration of bankruptcy or, more precisely, of the assignment of assets brought about by such a declaration. What is remarkable is that no clear ground can be found upon which that rejection was based.

Perhaps even more surprising is the readiness with which the decision in *In re Anderson*[1] was followed some five years later by Eve J. in *In re Craig*.[2] At the date of his bankruptcy in Western Australia in 1906, the bankrupt was entitled to a reversionary interest under a settlement in England, which his trustee in bankruptcy subsequently assigned for value. On the interest falling in, the assignees claimed it from the settlement trustees, and were met with the objection that in the absence of proof that the bankrupt (whose domicil of origin was English) had acquired a Western Australian domicil, no good title under his bankruptcy could be made to his English assets. Eve J., after briefly reviewing the authorities discussed above, accepting the view that Lord Romilly, despite his express references in *In re Blithman*[3] to domicil, only intended provisionally and as a measure of convenience to place the assets in the hands of the English trustee, and holding that Kekewich J. decided *In re Hayward*[4] on a complete misunderstanding of *In re Blithman*,[3] professed to follow *In re Anderson*,[5] and decided that domicil was immaterial and that the claim of the assignees of the reversionary interest was entitled to succeed. His examination of the *ratio decidendi* in *In re Anderson*[1] was superficial and uncritical in the extreme. He simply took the result at its face value, and in so doing added another to the authorities for the new proposition that domicil had no bearing on the effectiveness of the *cessio bonorum* in a foreign bankruptcy.

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[1] [1911] 1 K.B. 896, 903.

[2] (1916), 114 L.T. 896; (1917), H.B.R. 1; 86 L.J.Ch. 62.

[3] (1866), L.R. 2 Eq. 23.

[4] [1897] 1 Ch. 905.

[5] [1911] 1 K.B. 896.

The final case, which seems to have concluded the jurisprudence on the subject (since it is now nearly forty years since *In re Anderson*[1] was decided, and the decision still stands unshaken), was *Bergerem* v. *Marsh*,[2] which came before Bailhache J. in 1921. It arose out of the bankruptcy in Belgium of a domiciled Englishman. The debtor had been declared bankrupt by a process whereby the court makes an order of its own motion, leaving it to the debtor, by process of appeal, to apply for it to be set aside. The debtor did so apply, but without success. The Belgian curator then sued the debtor in England, claiming a declaration that the whole of the debtor's English assets had become vested in him. For the debtor two points were taken: first, that the Belgian proceedings, declaring him bankrupt unheard and leaving him with the burden of attacking the declaration, were contrary to natural justice and not entitled to recognition in England; and secondly, that the Belgian court had no jurisdiction to dispose of the English assets of a domiciled Englishman. The Court held on the first point that by appealing against the declaration in the Belgian court, the debtor had made himself a party to the proceedings (which were anyhow not contrary to all notions of justice), and could not now be heard to impeach them. On the second and more important point—that of domicil—it is significant that no attempt was made by anyone to rely on the debtor's submission to the jurisdiction of the Belgian court as an estoppel on the analogy of *In re Davidson's Settlement Trusts*[3] and *In re Lawson's Trusts*.[4] On the contrary, Bailhache J., taking *In re Anderson*[1] at its face value, the more readily because of the decision in *In re Craig*,[5] with *In re Burke*[6] (in which Astbury J. had also derived authority from the same two cases) thrown in for good measure, held that domicil was immaterial. He even prayed *In re Blithman*[7] in aid as an authority on the same side. Presumably he felt that the observations of Phillimore J. on that case[8] justified him in doing so.

The point has thus been reached in English law at which even a domiciled Englishman may be held by operation of a foreign (though not necessarily every foreign) declaration of bankruptcy to have assigned his movable assets in England. It would be going beyond the scope of the present discussion to inquire into the actual principle on which an English court will discriminate between the effect of one foreign bankruptcy and that of another. It is enough to observe that, in England at any rate, the test of domicil, and with it the application to bankruptcy of the maxim *mobilia sequuntur personam*, has been given its *quietus*.

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[1] [1911] 1 K.B. 896.

[2] (1921), 125 L.T. 630; (1921), B. & C.R. 195.

[3] (1873), L.R. 15 Eq. 383.

[4] [1896] 1 Ch. 175.

[5] (1917), H.B.R. 1.

[6] (1919), 148 L.T. Jo. 175. A trader, formerly domiciled in England, carried on business in Algiers and died there insolvent. He was posthumously declared bankrupt in Algiers in 1911. Grant of administration with the will annexed of his estate was made in 1917 to a creditor in England. The French Syndic ('trustee') claimed the English assets. Held, on proof that the effect of the order made in Algiers by a French court of competent jurisdiction was to vest the whole of deceased's estate in the Syndic, that the latter was entitled to the whole of the assets wheresoever situated.

[7] (1866), L.R. 2 Eq. 23.

[8] See *ante*, pp. 195, 197.

6. *International law and the maxim*

Embodying as it does a principle of private international law, the maxim is commonly found amongst the conflict rules of different legal systems. So far as public international law is concerned, the maxim (being concerned only with the title to private property) has, in the nature of things, no positive place.[1] Negatively, however, it may have some relation to public international law in that its operation as between two or more contracting states can in effect be excluded by treaty or convention.

There is no instance, at any rate with reference to bankruptcy, in which such exclusion is express. The conception of a personal law, which is the foundation of the maxim, is common to many legal systems. Where the laws conflict is in determining the factor (whether domicil, and in what sense, or nationality) which connects the person with his personal law, and in the classification of matters which are deemed to affect status. The subject of bankruptcy is one which falls within this disputed territory. Its validity is sometimes affected and sometimes not by its association with the domicil of the debtor. On one view it is regarded as a matter touching status; on another it is not. On a third view, as in English law, it affects status if declared at home, but is not recognized as so doing if declared elsewhere. Furthermore, the very concept of bankruptcy itself differs from jurisdiction to jurisdiction, both as to what involves bankruptcy and as to what is involved thereby. There can accordingly be no universal rule laying down the international effect of 'bankruptcy' as a conventional concept. It is and remains a matter of positive law.

In the first instance, therefore, each state determines for itself the nature and scope of a declaration of bankruptcy; and each state determines for itself whether and how far to recognize a bankruptcy declared in another state. It may refuse recognition altogether. It may, on the other hand, recognize all or some only of such foreign declarations as affecting either a bankruptcy in the full sense (as understood in the state according recognition), or as a general assignment or less complete surrender of the bankrupt's dominion over all or some particular classes of his assets, or simply as tantamount to a judgment *in rem* affecting the whole of the bankrupt's property within the jurisdiction of the court of the bankruptcy and all or some or none of his property outside that jurisdiction. Such recognition may be regulated either by the principles peculiar to the municipal law of the *situs* of the bankrupt's extraterritorial assets or by treaty.

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[1] It might perhaps be interesting to speculate whether the maxim would apply to a case such as could be imagined were, for example, Yugoslavia, as successor to the former Kingdom of Montenegro, to purport to give a title to a purchaser of what were once Montenegrin public movable assets situated in Italy. But as this discussion is confined to the law of bankruptcy, and no bankruptcy law applicable to sovereign states as such has as yet been evolved, the investigation of the wider aspect of the problem would be out of place here.

No world-wide or general convention exists whereby these many conflicting views have been resolved into an agreed formula. An attempt was, however, made in 1925 to work out a solution on an international level.[1] At the fifth Hague Conference on Private International Law,[2] convened by the Netherlands Government, judges (including a Judge of the Permanent Court of International Justice[3]), high-ranking diplomats and officials of Ministries of Justice, as well as other experts, coming from all the principal countries of Europe other than the U.S.S.R., represented their various states on the First Commission, which concerned itself with the question of insolvency. The rather modest delegation from Great Britain[4] (which felt unable even to speak for Scotland[5]), considering that there was no point of substance on which the differences between the English bankruptcy law and the laws of other countries could be reconciled, took practically no part in the discussions, and having presented a brief memorandum, which was left to speak for itself, politely withdrew after the first three meetings.[6] The remaining delegates, however, continued the discussions, and eventually drew up a Draft Convention,[7] designed for bilateral signature by any two countries prepared mutually to contract upon its terms.[8] Quite a comprehensive code was evolved for the regulation in effect in one country of a bankruptcy declared in another. For the present purposes, however, the only provisions of interest are those which were designed to deal with the effect on the debtor's foreign assets of a bankruptcy which the country of the *situs* had bound itself to recognize. Those provisions, so far as they went, are to be extracted from the terms of two articles.[9] The first of these articles extends, subject to purely administrative safeguards, the full effect of a bankruptcy declared in one of the contracting countries to the territory of the other. In so doing it overrides the application (assuming any to be in question) of every general principle, such as the maxim *mobilia sequuntur personam*, upon which the trustee in bankruptcy might otherwise found a claim to the foreign movables, or by virtue of which such a claim might be resisted if the trustee did not derive his titles from the *lex domicilii*. The bearing of the other article on the subject is less direct. It merely makes the debtor's nationality irrelevant to the mutual effect of a bankruptcy recognizable according to the terms of the Convention. The result is to exclude altogether any operation of the doctrine of the personal law, and with it, therefore, the rule embodied in the maxim. Since domicil[1] was made the criterion for determining the proper country for the one and only bankruptcy to command extraterritorial recognition, there might have been a possibility of confusion. If it were thought that, because in some countries domicil was the connecting factor with the personal law, this was the significance of domicil having been chosen as the basis of exclusive jurisdiction in bankruptcy, those countries in which the connecting factor was nationality might reasonably claim that this, and not domicil, should govern the validity of an exclusive bankruptcy. By expressly ruling out any possible relevancy of nationality, the framers of the draft Convention were declaring by inference that, in preferring the country of the domicil, they had in mind the commercial significance of domicil only, and were having no regard to the connexion in some systems of law between the domicil and the personal law.

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[1] This was not the first of such attempts. A draft Convention had been formulated by the fourth Hague Conference on Private International Law in 1904. But no government ratified it.

[2] See *Actes de la 5ᵉ Conférence de Droit International Privé de la Haye* (1925) (cited hereafter as *Actes, &c.*).

[3] Dr. Loder, of the Netherlands.

[4] This consisted of an official of the Board of Trade (the Inspector-General in Bankruptcy) and the Junior Counsel to the Board of Trade.

[5] See conclusion of Memorandum, *Actes, &c.*, p. 46.

[6] *Actes, &c.*, pp. 331, 46.

[7] Projet d'une Convention sur la faillite. Annexe du Rapport, *Actes, &c.*, p. 91.

[8] See Minutes, *Actes, &c.*, p. 87.

[9] *Art. 4.* Les effets de la faillite déclarée dans l'un des deux pays par un tribunal compétent aux

Interesting as is this draft Convention from a juridical point of view, as a matter of history it was and remained practically a dead letter. This fact was reported to the sixth Hague Conference on Private International Law, which met in January 1928, whereupon that Conference resolved[2] to add to the Convention the common-form clauses which had the effect of converting it into a document suitable for multilateral agreement. But the dead bones still failed to live, and in spite of the measure's distinguished parentage, not one of the countries concerned thought fit to make the necessary adjustments in its laws or to ratify it.

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termes de l'article 2 s'étendent au territoire de l'autre pays. Le syndic peut, en conséquence, prendre toutes mesures conservatoires ou d'administration et exercer toutes actions comme représentant du failli ou de la masse. Il ne peut, toutefois, procéder à des ventes d'immeubles ou à des actes d'exécution forcée que si le jugement déclaratif de faillite a été revêtu de l'exequatur.

Art. 16. La présente Convention s'applique aux faillites déclarées dans l'un des États contractants par le tribunal compétent d'après l'article 2, quelle que soit la nationalité du débiteur.

[1] See Art. 2 of the Draft Convention. The competent tribunal was to be that of the state where the debtor had his principal place of business, or if that was not in point in the country of the bankruptcy, then in the state where the debtor was domiciled. As no common law country took part in drafting the Convention, 'domicile' must be read in the civil law sense of place of residence.

[2] *Actes de la 6e Conférence de Droit International Privé de la Haye* (1928), pp. 442 ff.

Nevertheless, both before and since the Hague Conferences of 1925 and 1928, there have been international conventions on bankruptcy law, both bilateral and multilateral,[1] which, though varying in detail, have all followed the same lines of providing for the mutual recognition, and enforcement against extraterritorial assets, of bankruptcies declared in accordance with certain prescribed conditions. There is no instance in which the personal law as such has been made or even permitted to operate.

Nor is it surprising that many states have preferred to regularize their attitude towards claims to follow into one another's territories the assets of bankrupt estates by convention rather than in reliance on the controversial operation of the maxim. The problem of recognition or non-recognition of a foreign bankruptcy has always proved embarrassing to smooth commercial relationships. To refuse any kind of recognition is to open the door to injustice and to fraud: injustice to creditors within the jurisdiction of the *forum concursus*, who are limited to a dividend out of the domestic assets, while foreign creditors are free to scramble for full satisfaction out of the assets abroad, or the debtor himself is enjoying them in comfort and security; fraud, because there is nothing to prevent a debtor from deliberately placing his assets out of reach of his creditors in the country in which he has incurred his heaviest liabilities. Universal recognition of foreign bankruptcies would, on the other hand, be equally inconvenient. It would, in effect, give the courts of every foreign country plenary authority to interfere with the rights of persons outside their jurisdiction, to deny such persons the right to satisfy their debts even out of local assets, to compel them to accept a dividend or a composition or to acquiesce in the total discharge of their debtor from further liability, and even in certain events to repay what they had already received in satisfaction of their just claims. What the position might be where there were multiple foreign bankruptcies, each equally entitled to full recognition but involving conflicting claims owing to the differences in the laws by which they were respectively regulated, it is difficult to imagine. The only basis on which recognition can ever satisfactorily be given to a foreign declaration of bankruptcy is, therefore, one of reciprocity; that is to say, pursuant to a convention. But since a convention, by its very nature, substitutes an agreed effect of a foreign declaration for one derived from abstract principles of law,[1] there is no escape from the conclusion that, so far as bankruptcy is concerned, there is no room for the operation of the maxim as between sovereign states in their legal relationships with one another on behalf of their respective nationals and others within their jurisdiction.

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[1] Amongst the many examples of bilateral treaties, the following may be mentioned: Belgium and the Netherlands, 1925 (*League of Nations Treaty Series*, 93 (1929), pp. 432, 448); France and Italy, 1930 (ibid., vol. 153, pp. 136, 145); France and Monaco, 1935 (*Journal de droit international*, 1936, p. 1171); Austria and Germany, 1932 (*Mitteilung des Creditorens-Vereins von 1870*, pp. 4 ff. (draft only)). Noteworthy amongst multilateral treaties are: Scandinavian Bankruptcy Convention, 1933 (*League of Nations Treaty Series*, vol. 155, p. 116); the Bustamante Code, 1928 (ibid., vol. 86, p. 362); the Montevideo Treaties, 1940 (see *American Journal of International Law*, 37 (1943), Suppl., pp. 116, 120, 132, 138; note esp. Arts. 16 ff., 40 ff.). For fuller discussion of these and other treaties and conventions see Nadelmann, 'International Bankruptcy Law', in *University of Toronto Law Journal*, 5 (1944), pp. 324 ff.; the same, 'Bankruptcy Treaties', in *University of Pennsylvania Law Review*, vol. 93, pp. 1 ff.

The present international position with reference to this topic has been succinctly summarized by Nadelmann.[2] After a careful analysis of the laws of all the principal countries outside the British Commonwealth, he arrives at the following conclusion:

> 'There exists, at the present time, no general rule as part of the comity of nations following which the bankruptcy courts of one country assist the courts of another by allowing a foreign trustee in bankruptcy to obtain possession of local assets. On the contrary, in most of the countries delivery of local assets to him is refused at least if opposed by local creditors. On the other hand, in nearly all the civil law countries treaties have been concluded, especially with immediate neighbours, which provide for mutual assistance and a single bankruptcy administration.'

The absence of all reference to the rule embodied in the maxim will be observed. So, indeed, will be the express exclusion of every 'general rule' having a like effect. What is to be found is, on the one hand, resistance on principle to the laying of foreign hands on assets within the local jurisdiction; on the other, a certain disposition, on grounds of expediency, to work out a compromise in particular cases and on the basis of strict reciprocity. This follows the traditional lines of development of the comity of nations. However, England has followed a tradition of her own. Enamoured of no doctrinaire principle and impelled by no desire for a general compromise, those who have been responsible for the development of English law have clung or intended to cling stolidly to precedent, yielding to expediency square inches where others have surrendered acres, and leaving it to who will to discover academic terms in which to justify and explain some basis on which that law reposes. This much at least does clearly emerge, that England having worked the maxim *mobilia sequuntur personam* out of her bankruptcy system, other countries with a more international approach to 'commercial police law'[3] are unlikely ever in the future to allow it to infect theirs.

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[1] See *ante*, pp. 202–3 and 205.

[2] Nadelmann in *University of Toronto Law Journal* (1944), 5, p. 324, at p. 339.

[3] See *ante*, p. 185.

THE DOMICIL OF A WIDOW IN THE ENGLISH CONFLICT OF LAWS

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IT has been generally assumed *as a principle of law* that the domicil of a widow continues to be that of her late husband until she takes active steps to change it; and that the domicil of a person on attaining majority likewise remains that of the person on whom he or she was dependent during infancy, until an express change of domicil is made. Until 9 December 1949[1] no English judicial authority of a binding nature existed in support of either of these propositions.

The decision of Mr. Justice Hodson in *In re Wallach deceased*[1] gives us a realistic starting-point for a discussion of one aspect of the general problem stated above, namely, the domicil of a widow. In that case a Frenchwoman, whose domicil of origin was French or German,[2] married in 1906 a German national whose domicil of origin was in Germany, but who at the date of the marriage had acquired a domicil of choice in France. In 1936 the husband became a naturalized French subject. In 1939, owing to the threat of war, the parties came to England while awaiting the grant of an immigration visa to the United States. Before this was granted the husband died in London in 1943, leaving all his property to his wife if she should survive him by one week; but she committed suicide in London five days after her husband's death, leaving no relatives of such a degree as could succeed to her estate on intestacy if the English rules of intestate succession[3] were applicable (so that her estate would be *bona vacantia*); if, in other words, she died domiciled in England. Had the widow died domiciled in France or Germany, the plaintiff would have been entitled to share in the distribution of her estate. It was, therefore, in the interest of the Treasury Solicitor, the defendant, to try to prove that the deceased died domiciled in England; and on the allegation of the deceased's change of domicil to English the Treasury Solicitor became the plaintiff on a preliminary issue to ascertain domicil.[4]

With the first of the two lines of argument, the factual proof of change of domicil by the deceased's husband, we are only here concerned to note that he was held to have died domiciled in England, and to indicate the assumption on which the reasoning was based, namely, that a decision as to the husband's domicil at the date of his death must necessarily determine the domicil of his widow at the date of her death.[1] The second and purely legal argument, namely, the conversion of this assumption into a rule of law, raises an important question of legal principle which should not pass unnoticed. The assumption cannot be better stated than in the words of Hodson J.:[2]

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[1] *In re Wallach (deceased), Weinschenk* v. *Treasury Solicitor,* [1950] 1 All E.R. 199; 66 T.L.R. 132.

[2] In the event a decision on this point was unnecessary.

[3] Administration of Estates Act, 1925, s. 46.

[4] By consent the trial of the preliminary issue was treated as a trial of the action.

> 'The deceased, having been a married woman until five days before her death and being then a widow, according to the accepted principles of English law retains her late husband's domicil until she changes it: see Dicey's Conflict of Laws, 6th ed., p. 111, which contains the following rule: "A widow retains her late husband's last domicil until she changes it".'

Consideration of this proposition and of the reasoning and authorities adduced in support of it must be reserved for the moment. While it may appear later that the automatic retention by a widow of her late husband's domicil is not only unsupported by judicial authority, but perhaps even contrary to 'the accepted principles of English law', it is desirable first to view the problem in its wider legal perspective.

1. *Unity of domicil of husband and wife*

What we may call the problem of the widow's domicil appears, from the authorities, to form part of two wider issues: that of the unity of domicil of husband and wife, and that of the distinction between a domicil of choice and one by operation of law. That the first of these principles should appear relevant betrays an illogical confusion of thought, since *ex hypothesi* at the material date there is no husband or wife, the former having died and the latter thereby having become a widow and a *feme sole*. Nevertheless, the fact of connexion of the two questions remains, owing doubtless to the emphasis which British courts in the past have placed upon this unity of personal law.[3] Yet it is noteworthy that a decision as reactionary in its reasoning as *Attorney-General for Alberta* v. *Cook*[4] stopped short of projecting the dominant function of the husband's domicil beyond the span of the joint married life of the parties. All the references to the early writers[5] which caused Falconbridge and many of his brother lawyers in Canada no little surprise[1] were directed merely to showing the duration and effects of coverture at common law. At common law this unity of personal law, based on legal unity of person,[2] was co-terminous with the existence of the marriage, save in the two instances mentioned by Coke in which it was ended at an earlier date by conditions amounting to civil death, namely, profession of religion and abjuration of the realm.[3] Typical of the judicial limits placed upon the dependence of the wife's domicil are the judgments in *Lord Advocate* v. *Jaffrey*[4] dealing with the question of whether a wife, separated from her husband and having grounds for divorce, could acquire a domicil of her own. Viscount Haldane affirmed:[5] 'Not only is there no authority for the proposition that, under the laws of these islands, husband and wife can have, *while they continue married*,[6] distinct domicils, but if it were otherwise the consequences, in such circumstances as those before us, would be extraordinary.' Lord Dunedin observed:[7] 'The case of divorce need not be considered, for if there is a divorce *the foundation of the rule is gone*.[6] She has no longer a husband, and she could not therefore be bound by the changes of domicil of a person to whom she is connected by no family tie.'[8] There is wisdom in Lord Dunedin's concluding warning[9] that 'the only safe course is to keep close to the well-established rule that the domicil of a husband and wife, *undivorced*[6] and unseparated, is one and the same'.

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[1] The difficult question of fact dealt with in the major part of the judgment of Hodson J. is unreported in the series cited above. No other report has appeared up to the time of writing.

[2] [1950] 1 All E.R. 200.

[3] *Dolphin* v. *Robins* (1859), 7 H.L.C. 390; *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488; *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; *Attorney-General for Alberta* v. *Cook*, [1926] A.C. 444.

[4] (1926), 95 L.J.P.C. 102.

[5] Ibid., at p. 111. The writers referred to are Bracton (misquoted), Littleton, Coke, and Blackstone.

English writers agree that the domicil of a wife during coverture is the same as, and changes with, that of her husband.[10] Perhaps the most emphatic expression of this principle comes from Professor Cheshire, who writes,[11] '. . . it is a rule of English law, to which there is no exception whatsoever, that a wife cannot in any circumstances, not even after a judicial separation, either acquire or retain a separate domicil of her own'. It was not always so in England,[12] nor is this principle widely received elsewhere.[13] While, for example, in France,[1] Germany,[2] Spain,[3] the Province of Quebec,[4] and the United States[5] the rule of unity of domicil exists in a general sense,[6] not one of these legal systems denies the wife the power to acquire a domicil of her own in appropriate circumstances, such as desertion by the husband.[7] In Norway[8] and the Union of Soviet Socialist Republics,[9] moreover, even the main principle of unity of domicil finds no place. But this contrast of English law with that of civil law systems is not entirely valid, since despite a conspicuous movement in the direction of domicil, many of them employ the concept of nationality as the basis of personal law. As is well known, this is the case in France[10] and Germany, and the principle was embodied in the first article of the Hague Convention on the Effects of Marriage.[11] In such countries it is, accordingly, more in point to inquire whether the wife can acquire an independent nationality during her marriage, or reserve her pre-marriage nationality after the ceremony.[12] Good authority exists allowing her in certain circumstances to do this.[13]

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[1] See Falconbridge, *Essays on the Conflict of Laws* (1947), pp. 667–8; Read, *Recognition and Enforcement of Foreign Judgments* (1938), p. 206.

[2] In Bracton's words (*De Legibus*, fo. 429*a*) (1569 ed.), '. . . sicut inter virum et uxorem, qui sunt quasi unica persona, quia caro una et sanguis unus'.

[3] Coke, *Institutes* (1628), 1, sec. 200.

[4] [1921] 1 A.C. 146; (1920), 89 L.J.P.C. 209.

[5] (1920), 89 L.J.P.C. 211.

[6] Italics supplied.

[7] 89 L.J.P.C. 215.

[8] See also the remarks of Viscount Cave on the basis and duration of the rule of unity of domicil, 89 L.J.P.C. 213; and of Lord Shaw, ibid., at p. 219.

[9] Ibid., at p. 216.

[10] Dicey's *Conflict of Laws* (6th ed., 1949), p. 107; Cheshire, *Private International Law* (3rd ed., 1947), p. 237; Wolff, *Private International Law* (1945), p. 120; Schmitthoff, *English Conflict of Laws* (2nd ed., 1948), p. 85; Graveson, *Conflict of Laws* (1948), p. 77.

[11] In *Law Quarterly Review*, 61 (1945), p. 357.

[12] It was finally settled only in 1926 (*Attorney-General for Alberta* v. *Cook*, above). Fraser, *Husband and Wife* (2nd ed.) in 1876 allowed the wife a separate domicil on desertion by her husband (p. 583) or after a decree of judicial separation (p. 907). Twenty years later Rattigan, *Private International Law* (1895), expressed a similar rule (p. 40). Judicial dicta in favour of the wife's separate domicil were considered in *Cook*'s case (above) and in *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146.

[13] See *L.Q.R.*, 61 (1945), pp. 366–8; Cheshire, op. cit., p. 475, n. 3.

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[1] Code Civil, Art. 108; Niboyet, *Traité de Droit International Privé Français*, vol. i (2nd ed. 1947), p. 589.

[2] Melchior, *Die Grundlagen des deutschen internationalen Privatrechts* (1932), p. 454; Savigny, *Private International Law* (Guthrie's translation), (2nd ed.), p. 100.

[3] Goldschmidt, *Sistema y Filosofía del Derecho Internacional Privado*, vol. ii (1949), pp. 73–4.

[4] Lafleur, *The Conflict of Laws in the Province of Quebec* (1898), p. 57; Johnson, *The Conflict of Laws with Special Reference to the Law of the Province of Quebec*, vol. i (1933), p. 142.

[5] Story, *Conflict of Laws* (8th ed. 1883), s. 46; Beale, *Treatise on the Conflict of Laws*, vol. i (1935), p. 195; Jacobs, *Law of Domicil* (1887), sec. 209; Goodrich, *Conflict of Laws* (3rd ed. 1949), pp. 76–7; Nussbaum, *Principles of Private International Law* (1943), p. 134; *Restatement, Conflict of Laws* (1934), s. 27.

[6] Though doubts have been thrown on the existence of the rule even in this sense. In Cheatham, Dowling, Goodrich, and Griswold's *Cases and Materials on Conflict of Laws* (2nd ed. 1941), p. 41, the question is asked, 'Should the usually stated rule as to the domicil of a married woman be regarded as anything more than a presumption?'

[7] France—*Affaire Hauel* (*Sirey*, Part II (1858), p. 513); Levasseur, *Le Domicile en Droit international privé* (1931), p. 242: Germany—Introductory Law to BGB., s. 10: Spain—Goldschmidt, op. cit., pp. 73–4: Quebec—Lafleur, op. cit.: U.S.A.—Beale, op. cit., vol. i, pp. 201–8; Jacobs, op. cit., ss. 209 ff.; Goodrich, op. cit., p. 79; Cheetham and others, op. cit.; *Restatement, Conflict of Laws* (1934), s. 28.

[8] Rabel, *The Conflict of Laws*, vol. i (1945), p. 309.

[9] Gsovski, *Soviet Civil Law*, vol. i (1948), p. 117.

[10] Donnedieu de Vabres, *Conflit des lois* (1905), pp. 359, 524, writes: 'L'état et la capacité des personnes sont régis par leur loi nationale.' Niboyet, op. cit., p. 110, writes of the unity of national law of husband and wife as the basis of personal law in marriage. See also Pillet, *Traité pratique de Droit international privé*, vol. i (1923), p. 591.

[11] 17 July 1905, signed by Belgium, Germany, France (since withdrawn), Italy, Netherlands, Portugal, Roumania, and Sweden. Art. 1 was translated as follows by Baty (*Polarized Law* (1914), p. 184): 'The mutual rights and duties of consorts in their personal relations are governed by the law of their nationality. Nevertheless these rights and duties can only be enforced by the means which are available in similar circumstances according to the law of the country where enforcement is applied for.'

[12] See Bartin, *Principes de Droit international privé*, vol. ii (1932), paras. 285–7.

[13] Pillet, op. cit., vol. i, p. 591, cites decisions of the Cairo Mixed Tribunal of 13 May 1912 (*Sirey*, Part IV (1913), p. 1) and the Court of Aix of 7 November 1907 (ibid., Part II (1908), p. 89) upholding the wife's separate nationality. As Niboyet points out, the problem has become more acute in the past two decades. See also Pierard, *Divorce et séparation de corps*, vol. iii (1929). By virtue of the law of 10 August 1927, s. 8, and the Code of 1945 the traditional French policy of

But is the principle of unity of domicil of husband and wife really as inviolate as it is generally stated to be in English law? Its maintenance in cases of hardship to a deserted wife has caused a century of uneasiness to English judges, a feeling to which apologetic effect was given in two undefended decisions[1] at first instance which have not been followed in any reported case.[2] Since 1936 Parliament has been striving by statute to achieve the results in matters of jurisdiction of granting the wife an independent domicil, while rigorously preserving the principle of unity of domicil.[3] In this evasive double act of trying to have one's cake and eat it, it would appear that Parliament has finally bitten its own fingers, for section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949, can only mean that in many cases a wife has capacity to acquire an independent domicil in England before her husband has in fact died.[4] Informed opinion[5] in England is better represented by the words of American writers than by the traditional expression of native adherence to the principle of unity of domicil in all circumstances. 'An ironclad rule', writes Goodrich,[6] 'which arbitrarily assigns the husband's domicil to the wife in all situations makes many hard cases, and may lead to absurd results.' In the words of Rabel[7] with reference to American law: 'From the time that the wife acquired the power to assume a domicil of her own, duality of domicil as a basis for divorce jurisdiction has been possible, and all conceptions born of the ancient idea of marital unity have lost their sense.' By virtue of judicial law-making in certain American states not only may the wife acquire an independent domicil when deserted by her husband, but she may do so while relations between the two are amicable.[8] It has been held that a deserting

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unity of nationality has been destroyed in the case of marriages between French citizens and aliens—see Batiffol, *Traité élémentaire de Droit international privé* (1949), pp. 131–4.

[1] *Stathatos* v. *Stathatos*, [1913] P. 46; *De Montaigu* v. *De Montaigu*, [1913] P. 154.

[2] These decisions were considered in *Attorney-General for Alberta* v. *Cook* (above), and though not expressly disapproved, lost much of their value through the contrary decision in the later case. They were disapproved in *H.* v. *H.*, [1928] P. 206, and *Herd* v. *Herd*, [1936] P. 205, but have recently been followed in an unreported case; see Gower's review of 'Dicey's Conflict of Laws', in *Journal of the Society of Public Teachers of Law* (N.S.), vol. i (1949), p. 304.

[3] Matrimonial Causes Act, 1937, s. 13; Matrimonial Causes (War Marriages) Act, 1944, s. 1; Law Reform (Miscellaneous Provisions) Act, 1949, s. 1. See the present writer's *Conflict of Laws* (1948), p. 312, and cf. Canadian Divorce Jurisdiction Act, 1930.

[4] The relevant passage in this subsection runs as follows: 'and in determining for the purposes of this subsection whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living'. The writer has considered the effect of this provision more fully in *International Law Quarterly*, July 1950.

[5] Cheshire, op. cit., pp. 472–8; Dicey, op. cit., p. 107; Kahn-Freund in *Modern Law Review*, 5 (1941), p. 66.

[6] Op. cit., p. 79; Read, op. cit., p. 203; judgment of Mr. Justice Swayne in *Cheever* v. *Wilson* (1869), 9 Wall (U.S.) 108, at pp. 123–4.

[7] Op. cit., vol. i, p. 404.

[8] *McCormick* v. *U.S.* (1930), 57 Treas. Dec. 117; *Commonwealth* v. *Rutherford* (1933), 160 Va. 524; *Younger* v. *Gianotti* (1940), 138 S.W. (2d) 448 (Tenn.). The subject of the domicil of a married woman is dealt with by Beale in *Southern Law Quarterly*, 2 (1917), p. 93, and Parks in

wife can not only assume her own domicil, but confer such domicil on a child of the marriage whom she keeps with her in defiance of a custody order of the court of the husband's domicil.[1] It would seem to be no longer a question of whether the strict English principle will eventually be modified, as has happened already in the British Dominions, but simply how long we must wait before such modification takes place.[2] And if a wife can be free from her husband's domicil during his life, it is not easy to find justification for subjecting her to it after his death.

2. *Domicil of choice and domicil by operation of law*

The need to refer to the familiar distinction between domicil of choice and domicil by operation of law arises entirely from the fact that doubt appears to exist as to the juridical nature of a woman's domicil during her marriage and immediately after its ending. This doubt may be traced to a dictum of Lord Westbury in *Udny* v. *Udny*[3] which assumed decisive significance in *In re Wallach, deceased*.[4] Having described domicil of origin, the learned Lord observed: 'Other domicils, including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act.'[5] Citing the first part of this dictum with approval, Hodson J., in *In re Wallach, deceased*, remarked:

> 'He (Lord Westbury), therefore, included the domicil which counsel for the plaintiff prefers to call a dependent domicil under the heading of domicil of choice and that seems to me to be the appropriate heading under which to put it because when a woman marries a man she exercises a choice in the marriage and takes the consequence of that choice which in law involves the acquisition of his domicil. There is no reason why, if it is a domicil of choice, it should be lost in a way different from that in which any other domicil of choice can be lost, namely, by abandonment.'[6]

While *Udny* v. *Udny* is renowned for the clarity of its distinction between domicil of origin and domicil of choice, its casual and almost parenthetic identification of domicil of choice and domicil by operation of law is to be deplored. The self-contradiction of such assimilation is immediately apparent in the fact that a domicil of origin arises and comes into play only by

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Minnesota Law Review, 8 (1923), p. 28; and her right to acquire a separate domicil while living amicably with her husband in a series of notes cited, together with the above authorities, by Cheetham and others, op. cit. (2nd ed.), p. 41.

[1] *Boardman* v. *Boardman* (1948), 135 Conn. 124; see the writer's comment on this case in *Connecticut Bar Journal*, June 1949.

[2] Opportunity to restate English law on this point still rests with the House of Lords, by departing from the decisions of the Judicial Committee of the Privy Council in *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, and *Attorney-General for Alberta* v. *Cook*, [1926] A.C. 444, while remaining consistent with the House's decision in *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146.

[3] (1869), L.R. 1 Sc. & Div. 441.

[4] Above, p. 207.

[5] L.R. 1 Sc. & Div. 457.

[6] [1950] 1 All E.R. 200; 66 T.L.R. 134.

operation of law. There was, indeed, no suggestion in Lord Westbury's judgment that the married woman's domicil by operation of law was a domicil of choice because she had chosen it by marrying a man possessed of a different domicil from her own. The sentence of the judgment immediately following this unfortunate dictum would appear to contradict any such suggestion. Domicil by operation of law is a useful concept designed to confer a domicil in appropriate cases of legal disability completely and always irrespective of the wishes of the person affected. Domicil of choice is a concept, nowhere previously more clearly described than in *Udny* v. *Udny*, which can only and always come into being through the unfettered voluntary act and intention of the party affected, and which can only be lost in a corresponding voluntary manner. Let us take Lord Westbury's own words from the same judgment. He said:[1]

> 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office. . . .'

Does this describe how a woman takes her husband's domicil, even to 'the duties of office'? It is patently clear that a domicil of choice, if for no other reason than just because it is a domicil of choice, cannot be a domicil by operation of law in the normal and involuntary sense, but only in the broadest sense in which, domicil being a legal concept designed to secure the interests of society in the maintenance of its standards of domestic morality, any and every domicil is a creature of the law. Unless Lord Westbury was using the expression 'domicil by operation of law' in its narrower sense (as it is submitted he was), the distinctions which he drew in his judgment, for example between domicil of origin and domicil of choice, become pointless.

If we may admit that the domicil of a married woman cannot be both a domicil of choice and one by operation of law, the question remains, which is it? Mr. Justice Hodson has given us a clear and unambiguous answer in favour of domicil of choice, and this is now English law.[2] It is suggested that the decision in *In re Wallach, deceased*, is unsatisfactory on this point. A woman does not acquire her husband's domicil on marriage in the only way in which a domicil of choice can be acquired, namely, by an intention to remain permanently or indefinitely in a certain territorial legal unit, coupled with actual residence in that place. The domicil she receives on marriage has no necessary connexion with either the *factum* or *animus* of a domicil of choice. Such intention as she has at the date of

[1] L.R. 1 Sc. & Div. 458.

[2] *In re Wallach, deceased* (above).

marriage is directed to a person, not to a place. Again, there seems no precedent in the English law of domicil for importing into the requirement of *animus* the common law conception of liability for the natural and probable consequences (as to domicil) of the woman's act in marrying. Rather would it seem that English judges have insisted on the direct and immediate association of intention with the place of residence. Furthermore, the acceptance of the view that the domicil of a married woman is one of choice leads to great difficulties in the case of an infant who marries. A girl of twenty who marries has only a domicil of dependence on her father or widowed mother. This domicil by operation of law gives her no capacity to acquire a domicil of choice, at least if her domicil is English.[1] She cannot acquire a domicil of choice, yet when she marries she takes the domicil of her husband.[2] The logical conclusion is clear. It would seem that the legal classification of a married woman's domicil as one of choice was directed particularly to the holding that it could be lost only in the same way as that in which any other domicil of choice could be lost, namely, by abandonment.[3] The particular facts of *Wallach*'s case dealt with the domicil of a widow; but as this was held to be a continuation of her domicil of marriage, one may justifiably raise two queries. In the first place, if a married woman may only lose her domicil in the normal manner of loss of a domicil of choice, should she not acquire it only in the manner appropriate to this type of domicil, namely, by intention of permanent residence in a place coupled with actual residence there? Secondly, if she can only lose her marriage domicil in the manner of a domicil of choice, namely, by voluntary abandonment, why should she have to wait until the death of her husband, or divorce, before she puts into effect her free choice? An arguable consequence of this holding, and one which it is considered was never contemplated by the learned Judge, is the acquisition by the wife of an independent domicil of choice during marriage, or at least a reversion to her domicil of origin, through her abandonment of her 'domicil of choice'. If this argument is rejected, one is led of necessity to a further distinction between the normal domicil of choice and the domicil of a married woman, based on the time at which abandonment is possible. In the normal case there is no limitation whatever, for a domicil of choice may be abandoned at any time; but that of a married woman cannot be abandoned by her so long as the marriage lasts—so long, in other words (it will be submitted), as the married woman's domicil itself lasts.

The leading authorities in the common law reject the view that a married woman's domicil is one of choice. In a note to the fifth edition of Dicey's *Conflict of Laws*[1] appeared the following interesting comment on Lord Westbury's dictum:[2]

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[1] The question of choice of law in respect of capacity to acquire a domicil is considered by the present writer in *International Law Quarterly*, 3 (April 1950), pp. 149 ff.

[2] Dicey's *Conflict of Laws* (6th ed., 1949), p. 109.

[3] See *In re Wallach, deceased,* [1950] 1 All E.R. 200. This matter is considered more fully below, section 3.

> 'A woman who marries acquires the domicil of her husband. But such a domicil cannot conveniently be reckoned, though this is done by Lord Westbury in *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441, 457, 458, a domicil of choice as defined in Rule 5, for it cannot be said to be acquired by her own act merely, being the result of a bilateral agreement, which involves for the wife legal and unavoidable consequences.'

The learned editor of Dicey might have added to his comments the significant fact that Lord Westbury in the same dictum characterized the domicil of a married woman as one by operation of law. The confusion in this dictum probably arose through the need that was then felt of putting all types of domicil either into the category of domicil of choice or that of domicil of origin. The third distinct category, that of domicil of dependence,[3] had not been independently evolved in England by 1869 to include those cases of domicil by operation of law, as of infants and married women, which were not conferred at birth and did not revive in the absence of any other domicil (as in the case of domicil of origin), yet differed from domicil of choice in attaching and being lost irrespective of the wish or act of the person affected. In the United States, however, Story had expounded the three kinds of domicil as early as 1834, being 'domicil by birth, domicil by choice, and domicil by operation of law. . . . The last', he added, 'is consequential, as that of the wife arising from marriage.'[4] This third category of domicil, however, had also established itself in England over fifty years ago, while the types of case which it was designed to embrace are, of course, coeval with the concept of domicil itself, and may be found in Roman law. Jacobs[5] in 1887 spoke of the wife's 'derivative domicil', Savigny had called it a 'relative' domicil,[6] while Minor[7] in 1901 classified the domicil of dependent persons as 'constructive domicil'. In 1879 Dicey devoted special consideration to the various classifications of domicil,[8] describing a domicil by operation of law as 'one which a party receives by a rule of law, independently of any act of his own whereby he chooses a place or country as his home. Under this head fall the domicil of origin and the domicil of all dependent persons, such as infants or married women.'[9] We may well be content to conclude this part of the discussion by adopting Dicey's comments on the classification of domicils into those of (i) origin, and (ii) choice, a classification which he condemns as not being exhaustive. Of the matter of particular interest in this paper he observed:[1]

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[1] (1932), at p. 83, n. K.

[2] 'Other domicils, including domicil by operation of law, as on marriage, are domicils of choice' (*Udny* v. *Udny*, L.R. 1 Sc. & Div. 457).

[3] The writer has used this term (*Conflict of Laws*, p. 75), as most accurately and simply describing the domicil conferred on persons who are legally dependent.

[4] *Conflict of Laws*, s. 49. Beale, op. cit., vol. i, ch. 2, has adopted Story's classification, taking his alternative description of 'domicil of origin' in place of 'domicil by birth'.

[5] *Law of Domicil*, s. 222.

[6] Op. cit., p. 100.

[7] *Conflict of Laws* (1901), ss. 46–53.

[8] *Law of Domicil* (1879), App. II, pp. 339–41.

[9] Ibid., pp. 339–40.

> 'The domicil, for example, of a married woman is neither a domicil of origin nor of choice. It is not, or need not be, the domicil she received at birth; it is not therefore a domicil of origin. It is not, or need not be, the place or country chosen by herself for her home; it is not therefore a domicil of choice. The assertion indeed has been made by Lord Westbury that the domicil of a wife is a domicil of choice (*Udny* v. *Udny*, L.R. 1 Sc. App. 441, 457), but this doctrine, though resting on high authority, must (it is apprehended) be rejected as erroneous. A woman, on her marriage, no doubt exercises an act of choice in marrying, but the legal consequence of her marriage, viz. the acquisition and perpetual retention of her husband's domicil, is the result not of choice but of a rigid rule of law, which may for legal purposes counteract the effect of a wife's choice of a home (*Dolphin* v. *Robins*, 7 H.L.C. 390).'

It is respectfully submitted that Dicey's comments apply with no less force to the holding of the learned Judge in *In re Wallach, deceased.*[2]

3. *The domicil of a widow*

We are now in a position to consider more particularly the decision of Mr. Justice Hodson that a widow retains her late husband's domicil until she changes it in a manner appropriate to the abandonment of a domicil of choice.[3] This opinion is supported by Savigny, Dicey, and American jurists. Savigny wrote:[4] 'Wives have universally and necessarily the same domicil as their husbands. This domicil is retained by the widow so long as she does not enter into a new marriage, or otherwise voluntarily change her domicil.' Dicey's statement of the rule that 'A widow retains her late husband's last domicil until she changes it'[5] has remained substantially the same from the first to the last edition of his work, although the judicial authorities which he previously adduced in support of the proposition have been considered unworthy of inclusion in the last edition of *Conflict of Laws*.[6] Story wrote: 'A widow retains the domicil of her deceased husband until she obtains another domicil.'[7] Jacobs said: '. . . the dissolution of the marriage either by the death of her husband or by divorce would not remit her to her former domicil. Her derivative domicil continues after the death of her husband, or after divorce *a vinculo matrimonii*, until she acquires a domicil of choice in the usual way, or obtains another derivative domicil by a second marriage';[8] while Beale,[9] though regarding the domicil of a married woman as one by operation of law,[1] nevertheless maintained:[2] 'Upon the death of her husband the domicil of the wife continues to be that of her late husband until she changes it by her own act.' Goodrich expresses the same view,[3] citing in support nineteenth-century American decisions dealing with both death and divorce.[4] The only English writer other than Dicey who appears to deal directly with the point is Latey,[5] though Foote made the non-committal statement that 'a widow resumes on her husband's death the power of electing and changing her domicil as if she were a *feme sole*'.[6]

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[1] Op. cit., App. II, p. 340.

[2] Above, p. 207.

[3] *In re Wallach* (above).

[4] Op. cit., p. 100.

[5] Rule 11, sub-rule (2).

[6] *Gout* v. *Zimmermann* (1847), 5 Notes of Cases, 440; *In re Cooke's Trusts* (1887), 56 L.J. Ch. 637.

[7] *Conflict of Laws* (1883), s. 46.

[8] *Law of Domicil* (1887), s. 222.

[9] Op. cit., vol. i, p. 194.

If we examine the authority for these various statements it becomes clear that most of them were made, directly or indirectly, on the strength of a title of the *Digest*.[7] This is the immediate source of authority for Savigny, Story, and Jacobs, so that the citation by Dicey of the last two named authors places his statement of the principle on the same civil law foundation. There was, indeed, little enough judicial authority in the common law of England on which it could otherwise be based. The maintenance of the principle by modern American writers, such as Beale and Goodrich, rests on a firmer ground of American judicial precedent, and is entirely consistent with the doctrine in the United States of rejecting the automatic reversion of the domicil of origin between the loss of one domicil and the acquisition of another.[8] American authority for the extension into widowhood of the married woman's domicil is for this reason greatly qualified, if not entirely destroyed, in its application to the very different function of the English domicil of origin, operating as it does in the absence of any other domicil.[9]

It is necessary to examine two English authorities which come near to dealing with the question of whether the domicil of a married woman is co-terminous with coverture or whether it continues into her widowhood. Neither case directly decided this point. In *Gout* v. *Zimmermann*[10] the

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[1] Based on what Holmes J. called 'The now vanishing fiction of identity of person' (*Williamson* v. *Osenton* (1914), 232 U.S. 619).

[2] Op. cit., vol. i, p. 208.

[3] 'The fact of termination of a marriage by death of the husband or divorce does not change the domicil of the woman. She remains domiciled at the place where she was domiciled at the time the marriage terminated until she acquires a new domicil in the manner required for the acquisition of a domicil' (*Conflict of Laws* (3rd ed., 1949), p. 78).

[4] The latest of these decisions is *Ensor* v. *Graff*, 43 Md. 291, decided in 1875.

[5] 'The domicil of a married woman is that of her husband while the marriage subsists. A widow retains her late husband's last domicil until she changes it' (the learned author cites *Gout* v. *Zimmermann* as authority for the proposition). 'A divorced woman retains her former husband's domicil until she changes it' (*Divorce* (13th ed., 1945), p. 39).

[6] *Private International Jurisprudence* (2nd ed., 1890), p. 33. Cf. Cheshire, op. cit., p. 238: 'The only events which enable a woman to acquire a domicil different from that imposed upon her by the marriage are a decree of divorce or nullity and the death of the husband'; and see Wolff, op. cit., p. 120.

[7] *Dig.* 50, t. 1.

[8] Beale, op. cit., vol. i, p. 183; *Restatement, Conflict of Laws* (1934), s. 23 and comment (b).

[9] *Udny* v. *Udny* (above); *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307.

[10] (1847), 5 Notes of Cases, 440; 9 L.T.O.S. 412.

Prerogative Court of Canterbury had to consider the domicil of a widow who died in 1845 leaving movable property in England by a will in English form executed before the British chaplain at Smyrna. The deceased was born in Smyrna of Russian parentage and married a British subject by birth. Dr. Bayford for the next-of-kin, whilst admitting the wife's English domicil by virtue of marrying a domiciled Englishman, argued:[1] 'The question arises as to her character after her husband's death. Her domicil of origin then reverted to her; this is easily done, less being required to recover the domicil of birth than to acquire a new domicil.' The point of this argument was entirely missed so far as the judgment of the Court is correctly reported. Sir H. Jenner Fust assumed without referring to the revival of domicil of origin that the question of the widow's domicil was one of fact; and it is not surprising to find in a judgment of this date a confusion of domicil and nationality, making the decision one on nationality rather than on domicil. In rejecting the petition the learned Judge remarked:[2]

> 'I am of opinion that, according to the facts, the deceased is not proved to have died a domiciled subject of Holland and bound, in the disposition of her property by will, to govern herself according to the law of Holland, but that, *prima facie* she is entitled to be considered a British subject, having become so by marriage, and having done no act whereby she divested herself of the character she acquired by her marriage.'

This decision is accordingly of little help in determining the domicil of a widow.

The second of these authorities is *In the Goods of Raffenel*,[3] in which the deceased, who had an English domicil of origin, married a French naval officer who was domiciled in France until his death in 1850. After the death of her husband, the deceased frequently expressed her intention of returning to settle in England, though it was not until August 1853 that she actually embarked with her children and baggage, but had to return to land before sailing. She remained at the port of embarkation (Calais) for about three months in the hope of getting sufficiently well to undertake the voyage. In the words of the report: 'This not being the case and the remainder of the term of a house at Dunkerque being still on hand, they returned there on 20th November, 1853.' The widow never recovered and died in April 1854, having in the previous month made a will valid by English law but not by French. Moving the Court for probate of her will, Dr. Deane, Q.C., argued that the fact of her leaving Dunkerque on her journey to take a permanent residence in England was sufficient to give effect to the intention which she had of resuming her domicil of origin, amounting as it did to the abandonment of the acquired domicil. In rejecting the motion, Sir C. Cresswell gave his reasons in these few words:[4]

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[1] 5 Notes of Cases 443.

[2] Ibid., p. 447.

[3] (1863), 3 Sw. & Tr. 49.

[4] Ibid., at p. 50.

'I cannot think that the French domicil was abandoned so long as the deceased remained in the territory of France. It must be admitted that she never left France, and that intention alone is not sufficient.' It will be noticed that both the argument and the decision in this case failed to consider the strict doctrine of automatic revival of domicil of origin. The decision would seem to be of little authority for the proposition that a married woman's domicil automatically continues after the death of her husband, since in the first place the learned Judge treated the intended domicil in England of Mme Raffenel as a domicil of choice, for he referred to the inability to acquire domicil by intention alone where the fact of residence was lacking. As the deceased had a domicil of origin in England such reasoning, it is submitted, was misconceived and unnecessary. Secondly, the date of this decision is important, for it preceded *Bell* v. *Kennedy*[1] and *Udny* v. *Udny*,[2] in which the House of Lords laid down the basic principles of the English law of domicil and corrected at least one false doctrine, namely, the confusion of domicil and nationality. Apart from the now notorious dictum of Lord Westbury in *Udny* v. *Udny*[3] there appear to be no other modern authorities on the widow's domicil, though Jacobs[4] mentions an ancient one in Sir Leoline Jenkins's successful argument against French lawyers in favour of the widow's title to the domicil of her deceased husband on the question of the disputed succession to the personal property of Henrietta Maria, widow of Charles I.

In the absence of any binding or decisive English authority before *Wallach*'s case it is desirable to examine the consistency in principle of this recent decision with the accepted rules of domicil in the English conflict of laws. The dependent, consequential, or relative domicil (call it what one will) which a woman receives on marriage is not only designed to give effect in law to what in most cases is a situation of fact, but also to establish a single personal law for all members of a family so long as the marriage lasts and until the children reach the age of majority. This dependence of children on the domicil of their father comes to an end at an age at which the law regards them as capable of managing their own affairs, whether their parents are or are not still living when the children reach majority. The purpose of imposing legal incapacity in matters of domicil has then ended, just as the purpose of conferring a husband's domicil on the wife must logically end when the husband dies. After that date neither the husband nor his domicil exists, and the domicil of his widow cannot reasonably be made dependent on, or relational to, a non-existent domicil of a non-existent person. On the ending of her marriage the widow appears in law to have an ambiguous and illogical position. It is generally accepted that, provided she is of full age and sound mind, she is in the position of a *feme sole*,[1] and accordingly has capacity to acquire an independent domicil of choice. Yet it is denied that before this power comes to be exercised her domicil of origin revives. If the widow is indeed in the position of a normal adult, it is illogical to confer on her the power to acquire a domicil of choice without subjecting her before this happens to the rigid doctrine of revival of domicil of origin.[2] If, on the other hand, the widow is in some sense a legally dependent person the continuation in her of her deceased husband's domicil is justifiable; but such a continuation depends on the false premiss that the widow is dependent. One may well ask whether the continued attachment of this domicil is not the legal shadow of her widow's weeds which she must wear for a certain time, for a domicil of choice is not quickly or easily acquired. The inconsistency of simultaneously conferring on a widow both a dependent or relational domicil and capacity to acquire an independent domicil of choice needs no emphasis.

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[1] Above.

[2] Above.

[3] Above. The decision in *In re Cooke's Trusts* (1887), 56 L.J. Ch. 637, is considered irrelevant.

[4] Op. cit., s. 222.

It is submitted that in principle the death of a husband is the moment at which the normal English rules of domicil of an independent person should come into play. This submission is already half true in respect of capacity to acquire an independent domicil. The other half of the submission relating to revival of domicil of origin rests not only on the reason and logic of the matter, but on the principles stated by various members of the House of Lords in *Udny* v. *Udny*. Thus, Lord Chelmsford stated:[3] 'The domicil of origin always remains, as it were, in reserve, to be resorted to in case no other domicil is found to exist.' In Lord Westbury's words:[4] 'It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice.' If one agrees with the decision in *In re Wallach, deceased*[5] in regarding the married woman's domicil as one of choice, the remarks of Lord Hatherley[6] gain added significance when the object and purpose of this choice cease to exist, for the domicil of origin easily reverts.[7] 'There is no absurdity', remarked Lord Westbury,[8] 'and, on the contrary, much reason, in holding that an acquired domicil may be effectually abandoned by unequivocal intention and act; and that when it is so determined the domicil of origin revives until a new domicil of choice be acquired.' While the husband lives the wife has his domicil. His death is as unequivocal an act of abandonment of his domicil *animo et facto* as one could wish. The dependence of his wife on her husband's domicil leads logically to the loss of her domicil by the loss of his. But whereas the man has ceased to require a domicil, the woman must have one. It is surely for such a case that the doctrine of automatic revival of the domicil of origin is intended. One may ask whether it is less reasonable to argue on the above authorities that the widow's domicil should be that of origin until she acquires one of choice rather than that of her former husband, the kind of domicil appropriate to the face of the Cheshire cat without a body in *Alice in Wonderland*. To accept the situation of a dependent or relational domicil without a person on whom it can depend or to whom the holder is related demands an excursion out of the realms of law into those of metaphysics. Nor is it easy to see in what way 'The speeches delivered in the House of Lords in *Udny* v. *Udny* all point against the validity of the proposition of counsel for the plaintiff'[1] that 'the domicil which a woman acquires by marrying a man is a sort of mantle which she wears during her coverture and during her coverture only, and that when she becomes a widow she reverts automatically to her domicil of origin'.[2] It is considered no less maintainable that every judgment of the House in *Udny*'s case supports this proposition on the general principles of domicil.

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[1] *In re Wallach, deceased* (above).

[2] It is not opportune in this place to consider the merits and demerits of this doctrine, but merely to state the situation in which it applies in English law.

[3] L.R. 1 Sc. & D. 441 at 454 to 455.

[4] Ibid., p. 458.

[5] Above.

[6] 'Why should not the domicil of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned *animo et facto*, and whilst he is deliberating before he makes a second choice' (L.R. 1 Sc. & D. 441, 450).

[7] Judgment of Sir William Scott in *La Virginie*, 5 Rob. Adm. 99; *Munro* v. *Munro*, 7 Cl. & F. 871.

[8] L.R. 1 Sc. & Div. 459. See also judgment of Hatherley L.C.: ibid., at p. 452.

4. *The practical test*

It is not sufficient recommendation for the application of a rule of English law to a new situation that it is logical and consistent with principle. The first of these qualities is a relatively minor consideration, and rightly so. The relentless, empirical test is not even, will it work?, but, will it work justice? The case of Lucie Wallach is in point. There a Frenchwoman, married to a man originally of German nationality and domicil, was compelled by the threat and existence of war to live miserably in England from 1939 to 1943. She was entirely continental in upbringing and outlook, and could not have found life in English hotels and furnished flats very congenial during those difficult and dangerous years. When her husband died her natural desire to return to France and the life she knew and loved could not, for obvious reasons, be carried out, and she killed herself. There was no evidence of her wishing to make England her home, yet because her late husband was held to have acquired an English domicil of choice, she herself died with the same domicil. The simple application to her of the principle of reverter of domicil of origin on the death of her husband would have spanned by a rule of law the Channel which she would, but could not, cross. The rule would have worked, and it would not have worked injustice. One may also imagine such a case as this: a domiciled German married in England an Englishwoman having an English domicil of origin. The parties lived in England because of the husband's temporary employment here. Shortly after the marriage the husband was killed in a street accident. Should the widow's domicil be German or English? Reason and justice would seem to indicate the latter, and this result would be achieved in due course by the exercise of the widow's capacity to acquire an English domicil of choice. If, however, she died shortly after her husband, it is doubtful whether any rule but that of the reversion of her domicil of origin could by that time have conferred on her a domicil in the only country she knew.

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[1] *Per* Hodson J., [1950] 1 All E.R. 200.

[2] Ibid.

Two objections have been raised to the revival of the widow's domicil of origin on the death of her husband, which apparently carried considerable weight in *In re Wallach, deceased.*[1] The first was the 'manifest inconvenience' which its acceptance would cause 'because this form of dependent domicil applies equally to infants'. As the inconvenience is not manifest to the writer, it is somewhat difficult to discuss it in the abstract. Although the proposition that the infant's domicil of origin revives on his attaining majority and lasts until he acquires a domicil of choice can be supported by the same reasoning, *mutatis mutandis*, as that applicable to a widow, the cases of hardship which would be caused by failure to accept it would be fewer; for not only would the child on attaining majority normally continue to live in the country of his home and family, but, as distinct from the widow, a lifetime of opportunity lies before him for the choice of a domicil of his own. The two cases are hardly parallel. The point of the second objection is somewhat obscure, and deals with the case of *commorientes*, in which under English law the younger is deemed to have survived the older.[2] In the case of husband and wife, she being the younger, it was said that: 'She, having had no opportunity of changing her domicil after his death, would be deemed, if the proposition of counsel for the plaintiff were correct, to revert automatically to her domicil of origin, which might entail a most troublesome enquiry.'[3] But English judges are not deflected from their pursuit of justice by the troublesome nature of an inquiry. The learned Judge who was considering this very point had just spent six days hearing evidence and argument directed primarily to the ascertainment of a domicil, not of origin, but of choice; and it is significant that while very few English cases[4] have involved difficulties in the *ascertainment* (as distinct from the operation) of the domicil of origin, a high proportion of the leading cases in this field have gone to the House of Lords on the question of the ascertainment of the domicil of choice.[1] Moreover, it has been held in a case of succession that the English rule as to *commorientes*, being one of substantive law, would not apply where the parties had a foreign domicil at the date of their death.[2] This second objection appears unsubstantial.

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[1] [1950] 1 All E.R. 199, 200; 66 T.L.R. 132, 134.

[2] Law of Property Act, 1925, s. 184.

[3] [1950] 1 All E.R. 200.

[4] *In re O'Keefe*, [1940] Ch. 124, is one of the few.

The problem which has been discussed has other aspects, such as the domicil of a divorced woman, of a woman whose marriage has been annulled, and of an infant on attaining majority. Although the reasoning which has been applied to the divergent views of the widow's domicil is generally relevant to these other cases, it would be unsafe and contrary to the judicial tradition of the common law to make sweeping generalizations without careful consideration of each individual type of case. But it may be said with confidence that the argument on grounds of principle, justice, and social needs is stronger, if anything, in favour of reversion of the domicil of origin in cases of divorce and, *a fortiori*, annulment of marriage, than in the case of the husband's death; for if there is a divorce, 'the foundation of the rule (of unity of domicil) is gone';[3] while in cases of annulment the decree legally destroys the marriage retrospectively and *ab initio*. Dealing with a case of this kind the Court of Appeal in *De Reneville* v. *De Reneville*[4] was careful not to commit itself on the question of revival of the woman's domicil of origin. Lord Greene remarked:[5] 'If the marriage is by the proper law voidable and not void, . . . the wife will have acquired the same domicil as the husband by the mere fact of marriage and retains that domicil until the marriage is annulled.' The holding that the decree 'sets the wife free to change her domicil in the future'[6] does not, it is submitted, necessarily exclude the immediate revival of her domicil of origin on the pronouncement of the decree. The emphasis of English law has been upon the maintenance of the unity of domicil of husband and wife during, but not beyond, their joint married lives. But even during the period of marriage, as we have seen, incursions have been made by statute into the less desirable consequences, if not the principle, of this unity of domicil.[7] The domicil of the married woman is the last legal relic of any consequence of her former and almost total merging of legal personality into that of her husband. Even to maintain this dependence of domicil in all circumstances during marriage strikes our brothers throughout the British Commonwealth, in the United States of America, and on the continent of Europe as a quaint English survival in an age of emancipation of women which began almost seventy years ago. But it is utterly incongruous to subject the widow, the divorcée, and the woman who has just been told by the High Court that she never has been married, to the domicil of a corpse or a stranger in law.

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[1] E.g. *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307; *Udny* v. *Udny* (1869), L.R. 1 Sc. & Div. 441; *Wahl* v. *Attorney-General* (1932), 147 L.T. 382; *Winans* v. *Attorney-General* (1), [1904] A.C. 287; *Ramsay* v. *Liverpool Royal Infirmary*, [1930] A.C. 588.

[2] *In re Cohn*, [1945] Ch. 5.

[3] *Per* Lord Dunedin in *Lord Advocate* v. *Jaffrey* (1920), 89 L.J.P.C. 211 at 215.

[4] [1948] 1 All E.R. 56.

[5] Ibid., at p. 59.

[6] Ibid., at p. 60.

[7] Above, section 1.

CLAIMS ON BEHALF OF NATIONALS WHO ARE SHAREHOLDERS IN FOREIGN COMPANIES

By J. MERVYN JONES, LL.D.

I

THE era of foreign investment on a large scale reached its height during the fifty years or so preceding the First World War, when British and American capital poured into all parts of the world, financing railway and harbour construction, exploitation of mineral deposits and innumerable other projects in undeveloped countries. At the same time the institution of the joint-stock company with limited liability (which was of recent growth) made it possible for small capitalists to invest their money in remote countries for a better yield than was obtainable at home. There is little doubt that, at first, those countries welcomed foreign capital, which was badly needed, and were not strict as to conditions of investment. It was but rarely, during these early days, that any necessity arose for diplomatic intervention by foreign Powers on behalf of their nationals. With the turn of the nineteenth century, however, nationalist movements became directed against 'economic exploitation' by the foreigner. These movements emphasized economic, as well as political, sovereignty, and, as time went on, began to interfere more and more with the projects of foreign capital. The decay of liberal capitalism and *laissez-faire*, accompanied by the spread of socialist doctrine throughout the world, caused governments everywhere to assume greater control of the economic assets and resources of the nation: in certain countries foreign capital came to be regarded as an emblem of subordination, and not merely as a means of developing the country. Much, of course, had happened to justify such an attitude; the extent to which foreign capital held a grip on the economic life of many countries was considerable. Against this background the Revolutions of 1911–20 in Mexico transformed the political and social outlook of the nation, as did the later revolutions in Central Europe after the First World War, and those in Eastern Europe after the Second. These revolutions were accompanied by measures of expropriation, which inevitably raised the question of the position under international law of individuals who had invested in companies carrying on business in the countries concerned. Now that the old days of *laissez-faire* were over, the extent to which governments could interfere with foreign capital became an important issue. Yet all this intense economic development and profound social change has happened in the short space of less than half a century. Customary international law does not generally develop so quickly; it is hardly surprising, therefore, that a student of international law, looking for rules on the subject, has to search hard, and, when the search is ended, may be unable to say that the law is settled in all respects.

Before embarking on a discussion of the legal principles which govern intervention on behalf of shareholders in foreign companies, and in order to clarify the issues under discussion, it is necessary first briefly to consider the position of corporations in international law. A more detailed and thorough examination of the theoretical aspects of the problem will follow later.

A corporation is a juridical person. Under the laws of some countries, however (not under the laws of the United Kingdom), unincorporated associations (such as firms) may be juridical persons, and what is said here of corporations applies in principle to any other juridical person. It is agreed that diplomatic intervention, in order to be justified, must be on behalf of nationals of the intervening state. International law might have taken the line that a corporation is an artificial person and possesses no nationality, and that consequently there cannot be intervention on behalf of the corporation as such but only on behalf of the individuals who compose it. This, however, is not the view which has received international acceptance. International law and practice now attribute nationality to corporations,[1] though there is no unanimity as to the rules to be applied in determining that nationality. In so far as individuals are concerned it is settled that their nationality is determined by municipal law, but municipal law does not generally contain any rules regulating the nationality of corporations. Nevertheless, treaties to-day frequently speak of 'Nationals' as including corporations and usually adopt, as a test of such nationality, the fact that a corporation has been formed under the laws of a particular state. There is some authority in the decisions of arbitral tribunals for this test,[2] but it is not necessary, for the present purpose, to examine in detail the various theories and tests of the nationality of corporations.

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[1] This is, without doubt, a recent development, which, at least on the plane of *public* international law, belongs to this century. The idea of a corporation as *a distinct juridical person* is of great antiquity, but corporations being regarded as *nationals* is a modern idea. Corporations did not enter the field of international law until the nineteenth century (except perhaps as agents of the state, e.g. the East India Company) and nationality was for so long associated with personal allegiance that the idea of extending nationality from physical persons to cover artificial persons came about very gradually. See, as to this development, the writer's book *British Nationality Law and Practice* (1947), pp. 3–11 (see also the Law Officers' Opinion of 16 March 1891 cited at p. 228, n. 1, below, and what is said in the paragraph immediately following, together with the doctrinal note in *Ruden & Co.*, p. 227, n. 2, below).

[2] See *Société des Transports Fluviaux en Orient*, &c., reported in *Recueil des décisions des tribunaux arbitraux mixtes*, vol. ix (1930), p. 664, and *In re Mexico Plantagen*, reported in *Annual Digest*, 1931–2, Case No. 135. See also Hackworth, *Digest of International Law*, vol. iii (1942), p. 420.

Assuming, therefore, that corporations may be nationals, it follows that only the state of which they are nationals may intervene on their behalf, and this notwithstanding the fact that most of the members may be nationals of another state. The earliest treaties providing for arbitration did not, indeed, provide for claims on behalf of corporations (probably because foreign corporations as such did not operate in the countries concerned, or if they did, were so few as to raise no difficulties). Later they were so included[1] but it was not until many years afterwards (in fact, after the First World War) that specific provision was made allowing claims by nationals who were shareholders in corporations which were not nationals of the claimant state. It appears, however, that this practice has developed up to the point where, subject to certain qualifications, it may be said to form the basis of rules of international law.

A Claims Convention of 1868 between the United States and Peru provided for the submission to a tribunal of claims by 'corporations, firms or individuals' being citizens of the United States or Peru. One Ruden, a United States citizen, presented a claim, both on his own behalf and on behalf of the firm of Ruden & Co., which consisted of two members, namely, Ruden himself and another, being a citizen of New Grenada. The claim was for compensation in respect of the burning by rioters of a plantation belonging to the firm on Peruvian territory. There was a disagreement between the American and Peruvian Commissioners, and the issue was submitted to the Umpire, who held that the claims of the firm could not be considered because it was not an American, but a Peruvian, firm having been formed under, and subject to, Peruvian law. He held, however, that a claim lay in respect of Ruden's interest in the firm as an individual, and this claim could be espoused by the United States.

The main interest of the case, which is the earliest decision of its kind, lies in the doctrinal note written upon it by one of the learned editors of the Report,[2] as it illustrates an element of confusion which has from time to time afflicted the discussion of the subject. The writer approaches the decision from the standpoint of the nationality of associations, and predicates a choice between two solutions: either the claim has the nationality of the state under whose laws it was formed or the nationality of members of the firm. If the former choice was correct, the arbitration tribunal should dismiss the claim on behalf of an individual member; if the latter, then the claim could be allowed. The note concludes:

> 'Accueillant la demande de Ruden, associé américain d'une société péruvienne, l'arbitre écarte donc le concept abstrait de la personnalité de la société pour ne plus voir que la personne réelle de l'associé.'

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[1] See the doctrinal note in the case of *Ruden & Co.*, cited below, n. 2.

[2] Lapradelle-Politis, *Recueil des arbitrages internationaux* (1924), vol. ii, p. 589.

This interpretation of the decision is based upon a false dilemma. It does not follow, as later decisions and practice show, that international law has to decide absolutely whether damage sustained by a corporation must always be the subject of a claim by the corporation *or* always a claim by the members. In other words we do not necessarily have to take sides on the question whether the *real* persons to be considered are the members, and attribute a *nationality* to the claim accordingly. Indeed, unless all the members had the same nationality a solution on these lines would not be practicable. The possibility exists of two distinct claims: one on behalf of the association as such, and one on behalf of the members. The question is, in what circumstances will the latter lie? Is it also possible to admit that either the association or the members are entitled to claim in respect of *the same damage*? The decision in *Ruden & Co.* does not go into these questions, and is probably wrongly decided, but not for the reasons given by the learned commentator. Doctrine was not, however, developed on the point at the time, and it was a case *primae impressionis*.

As indicated at the beginning, there were political and economic reasons why intervention on behalf of nationals who were shareholders in foreign companies did not occur during most of the nineteenth century. The United States and the United Kingdom did not normally intervene even on behalf of corporations who were their nationals,[1] and still less on behalf of individuals who were interested in foreign companies. Thus, when the Government of the United States was approached, in 1865 and 1875, with a request that it should intervene on behalf of American stockholders in Chilean corporations it refused to do so. It adhered to the view that a corporation formed under local law should have recourse to the local courts, and that, although the *good offices* of the Government might with propriety be exercised on behalf of American interests, there could be no official intervention.[2] The United States Secretary of State in a dispatch to the Minister to Colombia, dated 27 April 1866, wrote as follows:

> 'It may well be that subjects of Great Britain, France and Russia are stockholders in our national banks. Such persons may own all the shares except a few necessary for the directors whom they select. Is it to be thought that each of those Powers shall intervene when their subjects consider the bank aggrieved by the operations of this Government? If it were tolerated, suppose England were to agree to one mode of adjustment, or one measure of damages, while France should insist upon another, what end is conceivable to the complications that might ensue?
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> 'It is argued that there is no policy which requires us to encourage the employment of American capital abroad by extending to it any protection beyond what is due the

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[1] Doubts were expressed, as late as 1891, as to how far most-favoured-nation clauses referring to 'British subjects' could be held to cover corporations constituted under English law and it was suggested that a company cannot be said to have any 'true nationality'. See a Law Officers' Opinion of 16 March 1891 [Argentine].

[2] Moore, *Digest of International Law* (1906), vol. vi, p. 644.

> strictest obligation. There is no wise policy in enlarging the capacity of our citizens domiciled abroad for purposes of mere pleasure, ease or profit to involve this Government in controversy with foreign Powers.'

The practice of the United Kingdom followed similar lines. For example, Sir Robert Phillimore, then Queen's Advocate, advised, on 12 August 1866, that the British Minister to Mexico should be instructed to limit himself to 'good offices' on behalf of a British shareholder in a Mexican railway seized by the Mexican Government, and that the British subject in question should be told that he must rely 'principally' on local legal remedies, and on memorials addressed by him to the Emperor of Mexico.[1]

Nevertheless in 1889 both Governments found reason to depart from their existing practice. In that year they intervened officially and pressed to arbitration a claim on behalf of British and American interests in a Portuguese corporation.

The facts of this affair were as follows. A concession was granted by the Portuguese Government to an American citizen, called MacMurdo, for the purpose of constructing a railway from the port of Lourenço Marques, on Delagoa Bay, to the Transvaal frontier. In order to carry out this project the concession stipulated that MacMurdo should form a company under the laws of Portugal; and such a company was accordingly formed, under the name of the Lourenço Marques and Transvaal Railway Company. Later MacMurdo assigned his concession to this company, receiving in return practically the entire stockholding interest in the company. He then tried to raise capital for this company by floating debenture bonds, but without success. In 1887, however, he approached certain British financiers who were prepared to raise capital, on condition that their interest should be represented by a company formed in England. The Delagoa Bay and East African Railway Company was formed with half a million pounds capital. To this company MacMurdo assigned his stockholding interest in the Portuguese company, together with the benefit of his concession, and, in return, the entire stock of the British company was assigned to MacMurdo. In addition the British company undertook to indemnify MacMurdo in respect of the contract, and to pay him £115,000. The British company then issued debentures, in order to pay MacMurdo, and to raise money to build the railway. Thus, the situation was that a British company owned practically all the stock in the Portuguese company, whilst the *entire* stock of the British company was owned by MacMurdo, an American citizen; and the necessary funds to construct the railway had been provided by debentures issued by the British company and taken up in London.

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[1] See also two earlier Law Officers' Opinions of 5 May 1854 (Germany) and 12 August 1858 (Germany) which similarly stress the independent existence of a company as a juridical person.

In July 1887 the Portuguese Government intimated that it would require an extension of the lines beyond the point at which the company alleged that the railway was to end. A dispute arose, and the Portuguese Government, in the middle of the dispute, cancelled the concession and seized the railway. Against this action both Great Britain and the United States protested by reason of the interest of their nationals as described above. The Portuguese Government maintained that it could deal only with the Portuguese company. The British Government replied as follows:

> 'Her Majesty's Government are of the opinion that the Portuguese Government had no right to cancel the concessions nor to forfeit the lines already constructed.
>
> 'They hold the action of the Portuguese Government to have been wrongful, and to have violated the clear rights, and injured the interests, of the British company which was powerless to prevent it, and which, as the Portuguese company is practically defunct, has no remedy except through the intervention of its own Government. In their judgment the British investors have suffered a grievous wrong in consequence of the forcible confiscation by the Portuguese Government of the line and materials belonging to the British company, and of the security on which the debentures of the British company had been advanced; and for that wrong Her Majesty's Government are bound to ask for compensation.'[1]

The British Government did not give any reason for its statement that the Portuguese company was 'practically defunct', and this statement was disputed by Portugal. Presumably it was based on the fact that the company had been deprived of its property and was no longer functioning as a going concern. The Reports of the Law Officers of 15 June and 18 August 1889 do not, however, discuss this point, and their advice that the claim of the British company might be pressed was clearly influenced by the consideration that the money raised by the debentures was subscribed 'with the knowledge and approval of the Portuguese Government'. It is rather curious that in the British Note of protest the fact of the company being 'defunct' was emphasized so much. Yet the United States also relied upon it, using the following language:

> 'The Portuguese company being without remedy, and having now practically ceased to exist, the only recourse of those whose property has been confiscated is the intervention of their respective Governments.'[2]

By a protocol signed on behalf of Great Britain, Portugal, and the United States the question of the amount of compensation was referred to three Swiss jurists, the question of principle (i.e. whether the claim lay at all) having, in effect, been conceded by the Portuguese Government. An award was made in 1899 and the compensation was duly paid.

The following points are to be noticed about this affair: (*a*) the company that sustained the injury was a Portuguese national and, as such, possessed no means of redress in the international field; (*b*) the preponderant interest in this company was owned by a British company; (*c*) British and American interests, the former as debenture-holders of the British Company, the latter as owning its entire stock, were affected; (*d*) the Portuguese company was 'practically defunct'. It was, therefore, clear that the real and substantial interests involved were British and American, that no government was entitled to intervene on behalf of the Portuguese company, and that, in any event, this company only continued to exist as a matter of form. In these circumstances it would have been impossible for the British and American interests to obtain justice without invoking the intervention of their Governments. The case is not, however, fully argued on these lines in the diplomatic correspondence, and the principles to be applied are not precisely defined. It was the first case that had arisen of its kind in international practice. Not many similar cases have arisen since, although there have been several decisions of arbitral tribunals, and stipulations have been inserted in a number of treaties allowing claims on behalf of nationals who are shareholders in foreign companies under defined conditions. Before proceeding to deal with the remaining material it is proposed to examine the problem from the standpoint of theory.

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[1] *State Papers*, vol. 81, p. 691.

[2] Moore, *Digest of International Law* (1906), vol. vi, p. 648.

II

When a state presents a claim, whether on behalf of an individual or a corporation, it is asserting a violation of its own legal rights because the interests of its nationals have been injuriously affected. The Permanent Court of International Justice expressed this rule as follows: 'By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf a State is in reality[1] asserting its own rights—its right to ensure in the person of its subject respect for the rules of international law.'[2] Accordingly, once the claim has been espoused by the state it becomes an *international* claim in respect of the injury in question. No rule obliges a state to protect its nationals even if a case where protection is justifiable under international law has arisen; a state has absolute discretion in the matter.[3] It may decide which of its nationals who have sustained injury at the hands of another state it will assist, and such a national may be an individual or a corporation.

The expression 'in the person of its subject' used by the Court raises the question whether the rights of a state are infringed when unlawful action is taken against a company which is not its national, but some of the shareholders of which are its nationals. If it is an absolute rule of international law, admitting of no qualification, that the only 'person' to be considered is the juridical person directly affected (i.e. the company), the state has no right to interfere in the circumstances supposed, even though some of the individual shareholders who are its nationals may have sustained damage as a result of the unlawful action taken. If, however, it is possible to go behind the corporate entity and nationality of the company and consider the loss suffered by the shareholders, the state may have a right of intervention. The question to be examined, therefore, is whether it is ever permissible to go behind the corporate entity, and, if so, under what conditions.

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[1] The Court here means 'in law', though the language used suggests that it means 'in fact'.

[2] *Mavrommatis Palestine Concessions*, Publications of the Court, Series A, No. 2, p. 12.

[3] This is the real purport of a Law Officers' Opinion of 13 December 1895 [Colombia] from which it appears that the extent of foreign interests in a British company was regarded as a factor to be taken into account in considering whether the company should receive British protection,

Certain first principles provide the starting-point for discussion. They are:

1. Treaty stipulations apart, a state may only present claims on behalf of its nationals.
2. Its nationals include individuals and corporations.
3. A corporation is a juridical person distinct from its members.
4. Consequently a wrong against the corporation (a violation of its legal rights) is not *ipso facto* a wrong against its members.
5. As a further corollary of (4), wrongs committed against the corporation should be the subject of redress by corporate action, and in the name of the corporation, and not by individual members, whether acting in concert or separately.

The last three of the above principles are not so much rules of international law, at any rate by origin, as rules of municipal law which have been accepted and incorporated into international law and practice. It will, therefore, be relevant to inquire whether, under municipal law, these rules are subject to any exceptions, for, if the municipal rule is applicable in international law, the municipal exception may also provide a useful analogy.

In fact exceptions do exist. Thus, the English and American courts, following the decision in *Foss* v. *Harbottle* (1843), 2 Hare 461, have held in a number of cases that, although the normal rule of law is that, since a corporation is a legal entity distinct from the shareholders, any action in respect of injuries to it must be taken in the corporate name by the directors, or by the secretary duly authorized by a resolution, nevertheless there are exceptions to this rule. These exceptions allow the shareholders to take action in their own names in respect of injuries to the corporate entity (*a*) when a fraudulent majority is using its power to commit acts which are *ultra vires* or to prevent steps being taken in the name of the company, or (*b*) the directors are committing a breach of trust, or are in fraudulent combination or decline to take proper steps to protect the interests of the corporation.[1]

The same principle is to be found in the jurisprudence and law of associations of other countries. Thus the French courts have held that, although the normal rule is that wrongs to the corporate entity must be redressed by an *action sociale* duly authorized by a resolution at a general meeting (i.e. an action in the company's name), the shareholders may, in certain circumstances, be allowed to bring an action in their own names (*ut singuli*) in respect of a wrong to the corporate entity. The right to bring an action *ut singuli* is distinct from the right of *action individuelle* which shareholders possess against the directors in respect of delicts committed by the latter against shareholders personally. These two distinct rights of action are described in the following quotations, of which the first relates to the *action individuelle* and the second to the action *ut singuli*. It is, of course, the second which is directly relevant for the present purpose:

> 'La personnalité morale de la société, pure fiction légale, ne s'interpose pas entre les associés et les administrateurs d'une manière absolue, et elle laisse subsister, dans leurs rapports internes, certaines obligations nées d'un second mandat, que les associés représentés par la société leur mandataire se trouvent avoir donné à plusieurs d'entre eux pour la gestion au mieux de leurs intérêts des affaires sociales. Dans cette opinion les administrateurs, étant unis directement aux actionnaires par un lien contractuel, la responsabilité dont ils sont tenus envers eux sera plus stricte que celle résultant des art. 382 et 383 (Cod. Civ.), car ils auront à répondre de toute omission, réticence, dissimulation, intentionnelle ou non, qui aura été, pour l'un ou quelques-uns d'entre eux, personnellement la source d'un préjudice.'[2]

The same authority writes:

> 'Doit-on reconnaître à un ou plusieurs actionnaires agissant individuellement le droit d'exercer *ut singuli* dans une mesure quelconque l'action sociale? . . . Avec les partisans d'une seconde opinion consacrée par la jurisprudence nous estimons que des actionnaires agissant isolément ont la faculté, si la société demeure dans l'inertie, d'entretenir l'action sociale en leur nom personnel.'[3]

Certain conditions must be complied with before the action *ut singuli* can be commenced:

1. The possibilities of a corporate action—*action sociale*—must have been exhausted, i.e. the general meeting must have failed to take action itself, the association being defunct or incapable of corporate action.
2. The shareholders bringing the action must have retained their shareholding interest.

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[1] Halsbury, *Laws of England* (2nd ed., 1932), vol. v, § 728; *American Corpus Iuris* (1919), vol. xiv, p. 925.

[2] Houpin et de Bosvieux, *Traité général théorique et pratique des sociétés civiles et commerciales* (7th ed., 1935), vol. ii, p. 262, No. 1,081.

[3] Ibid., p. 620, No. 1,368.

3. The action must be in the name of the shareholders (not the association).
4. The shareholders bringing the action must observe any rules laid down in the articles of association which restrict judicial process against the association.[1]

It appears that these principles were also followed in Belgian and Italian law up to 1913 and 1942, respectively, when the law was altered,[2] and that similar principles exist in modern Swiss[3] and Austrian[4] law. The laws of Sweden and Norway allow certain minority interests to bring actions on behalf of a company.

Municipal law, therefore, normally only permits claims for injuries to a corporation to be brought in the corporation's name, and by those entitled under the corporation's constitution to bring such actions, but exceptions to this rule do exist. Does this *normal* municipal rule provide a good analogy in dealing with the problem of claims under international law in respect of injuries to companies? If it does, it means that (normally) an international claim in respect of an injury to a company can only be made by the state of which the company is a national, and that it is not permissible to go behind the corporate entity of the company so as to permit claims to be made by states whose nationals some of the shareholders are. Is the weight of practical arguments against going behind the corporate entity in the matter of international claims, as a normal rule at any rate?

So far as the normal rule is concerned there can be little doubt that the analogy from municipal law is a sound one. The reasons which support it are equally valid in the international sphere. If a state of which the corporation is not a national could normally take up a claim in respect of an injury to the corporation merely because there are shareholders who are nationals of that state, and who have suffered loss, the results would be just as chaotic on the international plane as they would be under municipal law if any group of shareholders were allowed to sue in any case where the company has sustained damage. A situation might arise in which *x* shareholders of *y* nationality desired intervention by state *Y* but the others—perhaps the majority—thought this undesirable. How should this conflict be resolved? The answer is clear. The corporation's constitution itself prescribes a procedure by which the rights and interests of the members of the company *inter se* are regulated, and according to which the assets accruing to the corporation are to be distributed. Just as it would be contrary to principle in the generality of cases to ignore this procedure and allow individual shareholders to bring actions in municipal courts for wrongs suffered by the corporation, so also in international law it would be contrary to principle to allow a state representing only a section of the shareholders to present claims. The shareholders have formed themselves into a corporation, thereby creating a legal entity *vis-à-vis* themselves and the rest of the world. Just as in municipal law damage suffered by this entity must ordinarily be the subject of claims by the entity itself through its authorized agents, so also claims under international law in respect of such damage should be presented by one state on behalf of the corporation. In the matter of diplomatic claims there ought normally to be only one state entitled to act, and that could only be the state of which the corporation is a national.

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[1] Houpin et de Bosvieux, op. cit., vol. ii, p. 620, No. 1,368. See also Ripert, *Traité élémentaire de droit commercial* (1948), pp. 460–1, Nos. 1,217–19.

[2] Frédéricq, *Principes de droit commercial belge* (1930), vol. ii, pp. 349, 354–5, 358; Arts. 122 (2) and 147, *Codice Commerciale* (1865).

[3] Arts. 754 and 753, *Obligationenrecht* (amended version, 10 December 1941).

[4] Arts. 194, 195, and 226, *Handelsgesetzbuch.*

From the point of view of international practice there are, moreover, other considerations, pointing to the same conclusion, which do not arise in municipal law, in connexion with the manner in which redress for injuries to a corporation may be sought. They are as follows. For the purposes of claims under international law account has to be taken not only of the juridical personality of a corporation but also of its nationality. The normal rule that it is not possible to go behind the corporate personality is supplemented by another rule, namely, that a state may only present claims on behalf of its nationals. If a state could intervene without restriction on behalf of its individual nationals who were shareholders in a foreign corporation the position of Governments whose national the corporation was, and that of the state against whom the claims were brought, would be rendered intolerable. It might well be, in such circumstances, that the number of possible state claimants in respect of an injury to one large company could comprise half the world. Again, shareholders are not infrequently corporations themselves, and the process of identifying individual shareholders might be prolonged *ad infinitum*; such a process is in any case difficult in practice.

On the other hand, in those cases where the bulk of the shareholders are nationals of the country where the corporation was formed, the shareholders will possess the same nationality as the corporation, and there is even less reason to intervene on their behalf since their Government will in any event be entitled to intervene under the normal rules.

It is clear, therefore, that the analogy of municipal law holds good in international law so far as the normal rule is concerned, and, indeed, that there are special reasons in the international field which reinforce it. We may now ask: Do the *exceptions* to the rule in municipal law afford an equally good analogy for *exceptions* to the rule in international law? May it not be that, just as there are exceptions in municipal law, so there should be exceptions internationally? The basis of the municipal exceptions is that, in a particular case, the normal rule will work injustice, e.g. those who ought to bring proceedings in the corporate name will not do so because they are parties to the wrong done to the corporation, or because corporate action is, in fact, impossible. Situations of this kind are equally possible in the international field. Let us, therefore, consider in what circumstances in the international field the normal rule may be incapable of application and work injustice.

The principle on which respect for corporate personality is based is the fact that the corporate constitution makes provision for adjusting the rights of the shareholders *inter se*, and for the manner in which claims of the corporation against other persons may be pursued on behalf of the collectivity. It happens, however, that, from time to time, corporations become defunct or go into liquidation. Even then means may exist for representing the interests of the corporation, e.g. by a receiver or liquidator. But a point may be reached where such representation is merely formal and of no practical effect. In such a case the normal rule will not suffice to protect the interests of the shareholders. The same situation will arise where those charged with the interests of the corporation (i.e. the directors) are in league with the state inflicting a wrong upon it. These are cases where an analogous situation may arise in municipal law.

Secondly, the state which is entitled to protect a corporation may be the very one which is oppressing it. This has frequently happened in countries (as in some Central American states) where it is a condition of aliens carrying on business, or certain types of business, that they incorporate under local laws. In such cases intervention on behalf of the corporation is not possible under the normal rule of international law, as claims cannot be brought by foreign states on behalf of a national against its own Government. If the normal rule is applied foreign shareholders are at the mercy of the state in question; they may suffer serious loss, and yet be without redress. This is an extension in the international field of the situation which may arise in municipal law when those who should be defending the interest of the corporation fraudulently or wrongfully fail to do so (e.g. *Foss* v. *Harbottle*).

Thirdly, a corporation may be a national of a particular state but most, or all, of its shareholders may be nationals of another state or different states. The corporation may have been formed in a particular state for technical reasons, and the state, having no genuine interest in its concerns, may be disinclined to intervene. Examples of this type of case are many corporations formed in Panama or Liechtenstein, in which the majority of the shareholders are neither Panamanians nor citizens of Liechtenstein. The analogy from municipal law is not applicable to the same degree in situations of this third kind, for the principal reason why the shareholders may lack protection is due to the rule that a state cannot espouse the claim of a national of another state. Nevertheless the same general principle is in-involved, namely, that the party legally entitled to protect the interests of the corporation (e.g. Panama or Liechtenstein) will not do so.

In all these cases, if the ordinary rules are followed that a state may only protect a corporation which is its national, the result in practice may well be that such shareholders receive no protection, and the injury to their interests will be without remedy. It may be that the grounds for making an exception to the normal rule are more meritorious in one type of case than in another; for instance, the grounds are stronger in the first two types of case enumerated above than in the third. Indeed, in the cases which have arisen in practice, there appears to be no recorded instance of a claim to intervene in the third type of case, whereas, over a long period of time, diplomatic claims have been made and accepted in the first two types of cases. It seems, in other words, that states have been reluctant to intervene on behalf of their shareholder nationals where the corporation was formed under the laws of another state entitled to protect it, but that they have done so where the corporation is a national of the state inflicting the wrong, and especially where the conditions indicated by the first type of case set out above are also present, i.e. the corporation is defunct. The practice of states in the matter has, however, proceeded in an *ad hoc* fashion, and the principles on which intervention has been undertaken (or allowed by arbitral tribunals) have not always been clear. Suffice it to say generally that there is a substantial body of evidence that international practice and arbitral decisions recognize, in certain exceptional cases (principally the first two types of cases mentioned above), intervention on behalf of individual shareholders, notwithstanding the fact that the corporation itself is the legal person that has sustained the injury, and is not a national of the intervening state.

It is now proposed to review this evidence in greater detail.

III

In 1911 a corporation formed under the laws of Mexico and called the Tlahualilo Company became involved in a dispute with the Mexican Government in the following circumstances. The company was formed in order to develop the production of cotton in a certain area, and obtained, in 1888, from the Mexican Government a contract or concession which allowed it to colonize the lands of the company, to build a canal from the Nazas River (in the neighbourhood of which its properties were situated), and to take water from that river for irrigation purposes. In 1896 it mortgaged its property and franchises in order to secure an issue of £350,000 of bonds. The bond issue was made in London and New York. In 1908 the Mexican Government issued regulations for the distribution of the waters from the River Nazas which greatly reduced the amount of water the company had been receiving. The company protested and, receiving no redress, commenced proceedings against the Government in the Mexican courts, asking for specific performance of the contract and for damages. The Supreme Court of Mexico rejected the company's claim, holding that the concession was a sovereign act, and that any privileges obtained under it were a pure act of grace on the part of the Mexican Government; moreover, they held that, in view of the company's conduct in failing to observe requirements demanded of it by the Government, the latter was entitled to cancel the water rights.

In the meantime the company requested the good offices of the British and American Governments. The American Ambassador in Mexico was instructed to support the representations of the British Minister at Mexico City on behalf of the company. These representations were to the effect that, although the Government of the United Kingdom did not question the right of the Mexican Government to pursue a given economic policy, nevertheless, if, as a result, British rights were destroyed or rendered ineffective, full and adequate compensation must be paid, and that the Government of the United Kingdom would 'present to the Mexican Government a claim for damages for the injuries which have been suffered by those British subjects who have so heavily invested in this enterprise'.

The Mexican Government replied: (1) it must await the result of the proceedings in the courts; (2) 'the Tlahualilo Company is, and was from its beginning, a Mexican corporation whose shareholders, as far as the Mexican Government knows, were neither British subjects nor American citizens when the concession was granted'; (3) the company accepted, as a condition of the concession, submission to the jurisdiction of the Mexican courts; (4) the British and American interests in respect of which intervention was being made were those of mortgagees on the company's properties, whose sole legitimate interest was that their loan be well guaranteed, and their proper remedy was against the company, not the Mexican Government.

The Department of State instructed the American Ambassador to support any representations that might be made on the following lines by the British Legation in Mexico:

> 'My Government cannot accept the contentions of your Excellency's Note as a satisfactory reply, . . . and particularly it cannot accept the contention that the fact that the Tlahualilo Company is Mexican operates as a bar to representations by His Majesty's Government on behalf of British stock and bond holders of that Company, but . . ., on the contrary, His Majesty's Government must insist upon its right under the circumstances of this case to intervene for such stock and bond holders, such

course being in accord with well-recognised international precedents'[1] (citing *Delagoa Bay* case, &c.).

The British Note to the Mexican Government was on these lines.

The Mexican Government, after prolonged discussion, refused to accept arbitration, and proposed a settlement by direct agreement between the Government and the company. A contract was duly signed between the parties on 29 April 1913, by which the Mexican Government confirmed certain water rights to the company.

In 1925 the United States claimed the right, as against the Government of the United Kingdom, to intervene on behalf of American interests in a non-American corporation. The facts of this matter were as follows. As a result of the anticipated invasion of Roumania in 1916 it became essential for the Allied Powers to take steps to destroy oil plants and mills so as to prevent their exploitation by the enemy. In order to secure the assent of the Roumanian Government the Allies found it necessary to furnish that Government with a joint guarantee to the effect that Roumania would be compensated for the loss which would result from this destruction. The demolition was actually carried out by a British officer, although under the authority, and with the co-operation, of the Roumanian Government. Among the properties destroyed were those of the Romano-Americana Company, a company incorporated under Roumanian law and having its seat and sphere of operation entirely within Roumania. The shares of this company were held almost entirely by the Standard Oil Company of New Jersey. The United States Government sought, in the first instance, to hold the Government of the United Kingdom responsible for the loss sustained by their company, on the ground that it was as a result of the pressure exercised by the Allied Powers in Bucharest upon the Roumanian Government that the destruction occurred, and it was through the instrumentality of a British officer that it was carried out. The British Government denied liability: (*a*) because, notwithstanding the fact of such pressure, the work of destruction was nevertheless ordered by the Roumanian Government upon its own responsibility, and the undertaking given to that Government by the Government of the United Kingdom was a matter between the two Governments and could not be invoked by any private interests; (*b*) in any event the Government of the United Kingdom could not admit the right of the United States Government to present a claim on behalf of a non-American corporation.

Argument (*a*) is not relevant for the present purpose. As regards argument (*b*), the United States Government disputed the British position and replied as follows:

> 'Numerous precedents showing the practice of Governments to intervene on behalf

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[1] *U.S. Foreign Relations* (1913), p. 1003.

> of foreign corporations exist. Among these may be mentioned the Delagoa Bay case, El Triunfo case, the Alsop case, and the Tlahualilo case. . . . It would seem from the foregoing that the failure of Governments to protect their nationals in any case rests on other grounds, than that their interest is represented in foreign corporations, and that it is the established practice of Governments to protect the interests of their nationals in foreign corporations in appropriate cases.'[1]

It will be observed, however, that when the precedents cited in the United States Note (*Delagoa Bay*, &c.) are examined they all have in common a feature which was not present in the case of the *Romano-Americana*, namely, the fact that the corporation in question possessed the same nationality as that of the Government against whom the claim was brought, which was, in fact, also the Government responsible for the injury. The Romano-Americana Company was a Roumanian Company, and the contention of the British Government was that the claim lay, if at all, against the Roumanian Government. It was only in so far as the United States Government claimed against the Roumanian Government that the precedents it cited were relevant.

The reply of the Government of the United Kingdom to the American contentions contained, *inter alia*, the following observations:

> 'His Majesty's Government readily admit that many cases might be cited in which a Government has used its good offices in the interests of its own nationals who are stockholders in a foreign corporation; but it will be found upon examination that the cases in which the right of a Government to *intervene* on behalf of the shareholders of such a corporation for the purpose of establishing a claim against another Government, has been admitted, are few in number and exhibit certain marked characteristics, none of which are present in the case now under consideration.
>
> 'Cases of this kind fall, generally speaking, into two classes: (1) where the action of the Government against whom the claim is made has, in law or in fact, put an end to the Company's existence, or by confiscating its property, has compelled it to suspend operations; (2) where by special agreement between the two Governments a right to compensation has been accorded to the shareholders. From the second class of case it is plain that no principle of international law can be deduced. The first class, so far from being an exception to the general rule, is in fact an example of its application; for it is not until a company has ceased to have an active existence or has gone into liquidation that the interest of its shareholders ceases to be merely the right to share in the company's profits and becomes a right to share in its actual surplus assets.'[2]

The *Delagoa Bay* case (and other cases cited in the American Note) fell clearly into the first of the two classes specified in the British Note; whereas the case of the *Romano-Americana* did not. As regards the second class (cases provided for by special agreements), although in general a principle of international law cannot be deduced from provisions contained in a special agreement, yet this statement must be understood with a qualification: Where, over a considerable period of years, a large number of agreements of this kind have been concluded they do show that it is the practice to allow claims to be brought on behalf of nationals interested in foreign corporations where the parties consider that justice requires it. The provisions of these agreements and the inferences to be drawn from them will, however, be considered later.

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[1] Hackworth, *Digest of International Law*, vol. v (1943), p. 841.

[2] Ibid., p. 843.

The United States Government dropped its claim against the Government of the United Kingdom and had recourse to the Roumanian Government. The latter ultimately agreed to pay Romano-Americana a sum of rather more than £2 million, which was accepted in settlement and duly paid. In the result, therefore, this case is a precedent for a right to claim on behalf of shareholders when the company is a national of the state which is responsible for the damage, and in no other case.

In 1938 a dispute arose between the Mexican Government and that of the United Kingdom regarding claims by British shareholders arising from the expropriation by the Mexican Government of the properties of the Mexican Eagle Company—a company incorporated in Mexico in which the shareholding was approximately 70 per cent. British and Dutch, about 25 per cent. French, and the remainder Swiss, Danish, and other interests.[1]

On this occasion the Mexican Government stated:

> 'Mexico cannot admit that any State, on the pretext of protecting the interests of the shareholders of a Mexican company, may deny the existence of the legal entity of companies organised in Mexico in accordance with our laws.'

The Government of the United Kingdom replied:

> 'If the doctrine were admitted that a government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad.'[2]

The Mexican Government, in a further Note of 26 April 1938, maintained the view that a shareholder was not a co-owner of the property of the undertaking but 'merely the possessor of a right in equity to represent a part of the liquid assets at the moment of the dissolution or liquidation of the Company'. It was not until the moment of dissolution that it was possible to establish the damage and injuries sustained by shareholders as distinct from the company.[3]

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[1] As the shares in the company were in bearer form it is impossible to state with absolute certainty the exact proportion of each national interest.

[2] Cmd. 5758 of 1938.

[3] See also the decision of the American Commissioner in the case of *Kunhardt & Co.* discussed below, p. 246.

The reply of the Government of the United Kingdom to this argument had already been stated (or, as it were, stated in advance) in a previous Note of 21 April. The company as a Mexican entity was entitled to look in the first instance to the Mexican Government for protection. When, however, that Government resorted to measures 'the practical effect of which was to endanger the Company's existence by depriving it of assets in Mexico essential to the performance of most of the functions for which it was incorporated', the Government of the United Kingdom had the right to intervene to protect its nationals who were shareholders.

The Mexican Government shortly afterwards broke off diplomatic relations with the Government of the United Kingdom and these were not resumed until October 1941. Negotiations were subsequently opened in order to settle the terms of an exchange of notes which provided for a valuation of the expropriated properties, and for the eventual payment of compensation. The negotiations with the Mexican Government were conducted by the Government of the United Kingdom jointly with the Netherlands Government. (The Mexican Eagle Company, though registered in Mexico, was administered from London, and was closely associated with the Royal Dutch Shell Group.) Eventually, an agreement was signed on 7 February 1946 providing for the procedure to be followed in the matter of the valuation of the rights and interests of British subjects. Under this agreement experts were to determine an adequate valuation of such rights and interests, basing it upon their value at the time when they were affected by acts of the Government of Mexico. The properties of the Mexican Eagle Company were included in this arrangement. A similar arrangement was concluded between the Mexican Government and the Government of the Netherlands.[1]

The above are the principal cases where the United Kingdom or the United States have been concerned to press intervention on behalf of their nationals interested in foreign corporations. This practice is, so far as the United Kingdom is concerned, of long standing, though its history shows that, apart from the *Delagoa Bay* case, it has been rare for the Government of the United Kingdom to claim that, independently of treaty stipulations, cases of this type can be carried to the point of arbitration. During the last twenty years, however, it is believed that many such cases have been taken up with foreign governments. The present writer has not been able to discover any published evidence of the practice of states other than the United Kingdom and the United States. It is to be hoped that this article will draw the attention of foreign writers to the question and possibly stimulate the discovery of such evidence.

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[1] Cmd. 6768 of 1946.

IV

Arbitral jurisprudence on the subject does not present a coherent body of doctrine. It has been spasmodic, and not always clear on the fundamental principles. We have already seen that the actual arbitration in the *Delagoa Bay* case did not deal with the question of principle, and the earliest arbitral decision (*Ruden & Co.*), which has also been discussed above, does not make it clear on what basis Ruden's claim was allowed. There remain eight decisions which have a bearing on the question, not all of them, however, illuminating. The frequently cited *Cerruti*[1] and *Alsop*[2] claims may be dismissed with a few words. The first was an arbitration between Colombia and Italy in which President Cleveland was arbitrator. Cerruti, who was an Italian citizen, went in 1885 to live in Colombia, and was later charged by the Colombian authorities with having taken part in revolutionary activities. His property was confiscated—an act illegal under the Constitution. He made a claim for damages not only for himself but also for a corporation in which he was a shareholder. It was held that he could recover under both heads. No reasons were given for the decision and as the corporation was in any event *Italian* the case seems to have no bearing on the question under discussion, for there was no reason why the Italian Government should not have espoused the corporation's claim as such, and, in so far as Cerruti, *as an individual*, recovered *on behalf of the corporation*, the decision departs from principle. In the *Alsop* claim His Britannic Majesty was asked to act as *amiable compositeur* in a claim against Chile by the United States in respect of losses sustained by a Chilean firm in which American citizens were interested. The Chilean Government maintained that the case should be referred to the Chilean courts, and could not properly be the subject of a diplomatic claim as the claim was really Chilean. The decision rejects this proposition, but mainly on the ground that the terms of reference did not allow it to be put forward. The point was not, therefore, considered on its merits.

Another case which appears to have been generally misunderstood is the *Orinoco Steamship* claim.[3] This case was decided by the United States–Venezuelan Commission and the facts were as follows. The Orinoco Shipping and Trading Company was a British company which acquired a concession granting it a monopoly in the Orinoco River. The concession was rendered valueless by a decree of the Venezuelan Government proclaiming freedom of navigation and trade in the Orinoco. The company was registered in London but 99 per cent. of the shares were held by Americans.

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[1] *Revue générale de droit international public*, vol. vi (1899), p. 593.

[2] *State Papers*, vol. 104, p. 843.

[3] Ralston, *Venezuelan Arbitrations of 1903* (1904), p. 72.

As it was a British company the Foreign Office was approached, but declined to intervene in the matter. The American shareholders thereupon formed another company, called the Orinoco Steamship Company, in New Jersey, U.S.A., and the business assets and liabilities of the original company were taken over by this new company. Under the terms of the Claims Protocol signed by the United States and Venezuela the Commission had jurisdiction over 'all claims owned by citizens of the United States of America'. This phraseology was held by the Tribunal (that is to say, the Umpire, because the Venezuelan and American Commissioners disagreed) to give it jurisdiction over the claim notwithstanding the fact that, by origin, and at the time the claim arose, it was a British claim. The normal and well-settled rule is that a claim must remain of the same nationality throughout from the time of its origin to the time of its presentment. The Tribunal acknowledged the existence of this rule but held that it can be altered by treaty, and, in fact, this had been done in the present case by the language of the Protocol which referred to claims 'owned' by citizens of the United States at the time of its signature. The present claim was assigned by the British to the American Company on 1 April 1902; the protocol was signed on 17 February 1903: consequently the claim was 'owned' by citizens of the United States within the meaning of the Protocol, and was justiciable by the Commission.[1] The case is often cited as an authority for the proposition that it is permissible for an arbitral tribunal to penetrate the veil of corporate personality, but has nothing to do with that proposition.

This leaves us with the decisions that really are relevant, and specifically deal with the point under discussion. They are five in number—the *Baasch & Romer* claim, and the decisions in *Kunhardt & Co.*, *El Triunfo*, *Ziat Ben Kiran*, and what is commonly known as the '*Standard Oil* case'.

In *Baasch & Romer*[2] there were three separate claims by Messrs. Baasch and Romer, as successors of a firm consisting of four members, three of whom were Dutch subjects. This firm was extinct. The claims were heard by the Netherlands-Venezuelan Commission. Baasch and Romer claimed:

(1) on behalf of the extinct firm, and

(2) on behalf of another firm, of which they were liquidators, which firm was called *Leseur, Romer & Baasch*, and consisted of six members, four of whom were Dutch subjects, and

(3) as the aforesaid liquidators of Leseur, Romer & Baasch on behalf of a Venezuelan corporation with paid-up capital of 240,000 bolivars

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[1] The decision was later reviewed by the Permanent Court of Arbitration for error of law, but this particular point of jurisdiction was not in dispute before the Court, who made no pronouncement upon it: Scott, *Hague Court Reports* (1916), p. 226.

[2] Ralston, *Venezuelan Arbitrations of 1903* (1904), p. 906.

—in which the said firm Leseur, Romer & Baasch held capital stock to the amount of 26,800 bolivars.

The claims under the first two heads were claims in respect of goods delivered to the Venezuelan Government and not paid for; also for other sums owing to the firms in question. These claims were allowed to the extent of the Dutch interest in the firm, i.e. as regards item (1) above, three-quarters of the claim, as regards item (2) two-thirds of the claim. The Umpire said:

> 'The umpire holds, for the purposes of this case, that, the two firms being extinct, the claims may be allowed in proportion to the stated interest of the Dutch members thereof.'

Item (3) was totally disallowed on the following grounds:

> 'A claim for the practical destruction of the plant of the Luz Electrica de Barquisimento Company, a corporation with a paid up capital of 240,000 bolivars, by troops in command of General Freites. The extinct firm of Leseur, Romer & Baasch held capital stock to the amount of 26,800 bolivars. The destruction of the plant bankrupted the company and they claim to recover the full amount of the shares. It is not necessary to consider this claim further than to accede to the position taken by the learned agent of the respondent government. It is a Venezuelan corporation, created and existing under, and by virtue of, Venezuelan law, and has its domicile in Venezuela. The Mixed Commission has no jurisdiction over the claim. It is the corporation whose property was injured. It may have a rightful claim before the Venezuelan Courts but it has no standing here. The shareholders being Dutch does not affect the question. The nationality of the Corporation is the sole matter to be considered. The claim is therefore dismissed without prejudice.'[1]

The decision presents some puzzling features, as, of the two claimants, Romer was Dutch and Baasch was not (his nationality is not stated). They were not *themselves* claiming as a firm, but as individual claimants, on behalf of two extinct firms, and on behalf of a Venezuelan corporation. The Umpire, in allowing the claims in respect of the two extinct firms, stated:

> 'He does this the more readily because there seems to be no question about the indebtedness of the National Government, and it, at most, means a payment in this way instead of some other, and will be a cancellation of its indebtedness *pro tanto*, which indebtedness it must discharge in some way. No inequity or injustice is therefore done *even if a technical mistake has been made*.'[2]

The 'technical mistake' lay in allowing Baasch a *locus standi* before the tribunal. For the rest the decision establishes the following principles:

(*a*) Assuming (which is not clear) that the extinct firms possessed juridical personality, the fact that they *were* extinct motivated the decision allowing a claim *as successors or liquidators*, but, whether they possessed juridical personality or not, the fact that they were extinct was evidently held to be material.

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[1] Ibid., pp. 909–10.

[2] Italics mine.

(*b*) The Claimants had no *locus standi* as liquidators *on behalf of one of* the extinct firms *in respect of its interest* in a Venezuelan Corporation which had suffered damage.

It will be noticed that there was no evidence that the Venezuelan corporation was incapable of asserting its rights in the courts, or that it had attempted to do so, or that there was any obstacle or conspiracy amongst the directors which prevented it from doing so. On the other hand, the firms had disintegrated, leaving real interests of the Dutch members without effective protection other than through the medium of the liquidators. Substantial justice was, therefore, done, by allowing a claim on behalf of the Dutch members of the extinct firms, but denying it in respect of a Venezuelan corporation which still apparently existed in fact and in law.

The *Kunhardt* claim was a case decided by the United States–Venezuelan Commission.[1] Kunhardt & Co. was a co-partnership composed of three American citizens. In July 1899 they became the owners of an interest in a corporation formed in Venezuela, called the *Companhia Anonima Trasportes en Encontrados*. The interest represented about five-sixths of the total capital of the Corporation. In November 1900 the Venezuelan Congress passed a resolution annulling a contract made by the Government with the *Companhia Anonima Trasportes*. The firm of Kunhardt & Co. claimed damages on the ground that the cancellation was illegal and wrongfully deprived the shareholders in the corporation of the property to which they were entitled. The Venezuelan Government replied that, if any claim arose against it, only the managers of the company, or the receiver in case of dissolution, could make a claim. The Commissioners held that the claim must be disallowed, but the two Commissioners—Venezuelan and American—differed as to the reasons for their decision.

According to the American Commissioner the action of the Government destroyed the capital of the Corporation, and, under Venezuelan law, put the company *ipso facto* in liquidation:

> 'Where the capital of the Corporation was practically destroyed by the taking away of that which represented it, the company was dissolved by operation of law, and the by-laws above cited. While the property of a corporation *in esse* belongs, not to the stockholders, individually or collectively, but to the corporation itself, it is a principle of law universally recognized that, upon dissolution, the interests of the several stockholders become equitable rights to proportionate shares of the corporate property, after payment of the debts. The rights of the creditors and shareholders to real and personal property of the corporation, as well as to its rights of contract and *choses in action*, are not destroyed by dissolution or liquidation. But in such cases the creditors of the corporation have a right of priority of payment in preference to the stockholders.'

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[1] Ralston, *Venezuelan Arbitrations of 1903* (1904), p. 63.

The last sentence of this quotation raises a difficult question which will be discussed later: does this priority of the creditors, which undoubtedly exists under municipal law, extend to the international field? The creditors are not, as such, constituent members of the corporation; ought not *their* claims to be relegated to the field of municipal law, so that, even in the event of dissolution, they take such remedies as are available to them in that field? To the present writer it seems that this solution is juridically the correct one. A wrong against the corporation is not a wrong against them (the creditors); *their* relationship with the corporation is purely contractual, and, unless their contract is directly operated upon by the action of the state, there has been no such interference with their rights as entitles the state to which they belong to intervene. Does not intervention on behalf of the shareholders rest (when it is admissible) on a quite distinct principle which cannot normally apply to the creditors, i.e. denial of justice; the essence of the matter being that in no other way can the shareholders' interests be protected? But a little more will be said of this later.

The decision of the Commissioner went on, however, to hold that Kunhardt & Co., as citizens of the United States, and as equitable owners of a proportionate share in the property of the dissolved Corporation, had a standing before the Commission to make claim for indemnity for such losses as they could prove resulted from the wrongful annulment of the concession. However, the creditors were entitled to a prior claim, and, as no proof of the actual debts was produced, it was impossible to 'determine the actual measure of the claimants' loss'. Consequently the claim must be disallowed 'without prejudice to the corporation, its creditors, and stockholders, or to the interest of claimants'.

The Venezuelan Commissioner, though reaching the same conclusion, took his stand on the principle that the Corporation was still in existence, and had not been dissolved, in accordance with Venezuelan law. Consequently the precedents of the *El Triunfo* claim and the *Delagoa Bay* case did not apply. He said:

> 'The integrity of the rights of the corporation remain in the corporation itself, and its exercise is specially and legally entrusted by the common law, by the provisions of the commercial law, and by the social contract, to the manager and the board of directors. Therefore the said rights cannot be exercised by any other person than the directors of the corporation.'

It must be admitted that this decision raises problems rather than solves them. Both Commissioners, in principle, adhered to the view that the rights of creditors and shareholders were matters to be dealt with under the corporate constitution, and should not be brought before an international tribunal at all. In other words, as the Corporation was Venezuelan, not American, the United States had no right to intervene merely because

American interests—even the substantial interests of Kunhardt & Co.—existed in the corporation. On the other hand, both Commissioners held that a claim by the firm of Kunhardt & Co.,—*as a firm*—would lie in respect of damage by troops to a farm owned by the firm itself: in this instance the same problem did not arise.

In the *El Triunfo* claim[1] the facts were as follows: In 1894 a concession was granted by the Government of Salvador to establish steam navigation in El Triunfo, Salvador, to two citizens of the United States and two Salvadoreans on condition that they formed a corporation under the laws of Salvador to operate it. The President and Secretary of the corporation so formed were citizens of the United States, and a majority of its shares were owned by the Salvador Commercial Company, a corporation under the laws of the State of California.

As a result of certain irregularities in the internal business of the corporation the lawful directorate was replaced by usurpers, who had the company declared bankrupt in order to promote certain competing interests of their own. The Salvador Commercial Company, and other American investors, endeavoured to have the bankruptcy proceedings against the El Triunfo Company set aside, and the former lawfully elected directorate reinstated. The President of Salvador, whilst this was going on, issued a decree closing the port of El Triunfo, and granted to other persons, citizens of Salvador, a concession of the franchise covered by the concession of 1894. The owners of the American interests protested, but their protest was not heeded and they appealed for protection to the Government of the United States. The latter asked for arbitration, to which the Salvadorean Government replied that the case concerned a Salvadorean corporation, and should be dealt with exclusively by the Salvadorean courts. The United States pointed out that the American citizens who were substantial owners of the enterprise were proceeding by judicial methods when the President issued his decree. Arbitration was eventually agreed upon.

A majority of the arbitrators concurred in an award of damages, stating that the bankruptcy proceedings were the result of a conspiracy and were fraudulent. In their award they said:

> 'We have not discussed the question of the right of the United States under international law to make reclamation for these shareholders in the El Triunfo Company, a domestic corporation of Salvador, for the reason that the question of such right is fully settled by the conclusions reached in the frequently cited and well-understood Delagoa Bay Railway arbitration.'

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[1] Moore, *Digest of International Law* (1906), vol. vi, p. 649; *United States Foreign Relations* (1902), pp. 838–52 (more fully).

The facts of the case clearly show (1) that the internal affairs of the corporation were in confusion, and (2) that the Salvadorean Government was itself taking part in the conspiracy to defeat the interests of the majority of the incorporators. In these circumstances it would have been futile to insist on the doctrine that the claim must be regarded as a Salvadorean claim (i.e. a claim of the corporation) and to deny the right of intervention on behalf of the American interests.

In the *Ziat Ben Kiran* case[1] there was a claim for loss of goods and debts made irrecoverable because of the destruction of account books during a riot in the Spanish Zone of Morocco in 1921. Losses were suffered by a firm constituted under Spanish law and therefore of Spanish nationality. The members of the firm were a naturalized British subject and a Moroccan, but the present claim was on behalf of the British subject.[2] In view of the Spanish nationality of the firm Spain contested the British right to bring the claim. It was held that this contention was wrong:[3]

> 'The jurisprudence of international tribunals recognizes the possibility of distinguishing for the purposes of international arbitration between the component parts of an association and the association itself. International law, which in this matter is governed mainly by considerations of equity, has not so far established any formal test for admitting or refusing diplomatic protection of national interests bound up with interests vested in another nationality. It is necessary to examine whether the person on whose behalf the claim is brought forward is directly affected by the damage, or whether he is merely the creditor of the juridical person directly affected by the damage.'[4]

The Tribunal rejected the claim, but on another ground, namely, that no negligence on the part of the Spanish authorities in this case could be established, and nothing further was said about the point dealt with in the above quotation.

The last case for consideration is the *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers*.[5]

Under the Treaty of Versailles the German Government agreed to cede to the Allied and Associated Governments (represented for the purpose by the Reparation Commission) the property in all German merchant ships which were of 1,600 tons gross and upwards. These ships were defined so as to include 'all ships and boats which (*a*) fly or are entitled to fly the German merchant flag, or (*b*) are owned by any German national, company, or corporation'. In execution of these provisions the German Government delivered to the Reparation Commission certain tankers which belonged to the *Deutsche Amerikanische Petroleum Gesellschaft* (known as the D.A.P.G.).

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[1] British claims in Morocco under the Anglo-Spanish Agreement of 1923: *Annual Digest*, 1923–4, Case No. 102; *Réclamations britanniques dans la Zone espagnole du Maroc: Rapports* (The Hague, 1925), p. 185.

[2] Unlike the Baasch & Romer case, where Baasch (though having no *locus standi*) was admitted as one of the claimants ('a technical mistake'—see above, p. 245).

[3] The Agreement of 1923 (setting up the Tribunal) referred merely to 'claims of British subjects or British-protected persons against the Spanish authorities for damage to life and property', and said nothing about claims in respect of damage sustained by juridical persons in which British subjects were interested.

[4] This sentence justifies the distinction made above, p. 247.

[5] An arbitration between the United States and the Reparation Commission, under a Special Agreement: Date of award, 5 August 1926. *Reports of International Arbitral Awards* (published by the United Nations), vol. ii, p. 779.

In March 1919, and later, the Standard Oil Company of New Jersey protested to the Peace Conference and to the Reparation Commission against the delivery to the Commission of these vessels, of which it claimed the ownership. In support of its claim the company relied upon the fact that the D.A.P.G. had been created by it with the help of capital supplied by it, and employed in the construction of these vessels. It claimed that its ownership in the vessels was of a special kind, namely, 'beneficial ownership'. By a Convention between the Reparation Commission and the United States Government the question whether it was so or not was submitted to arbitration.

The Standard Oil Company submitted that it was the owner of all the shares, and almost all the securities, of the D.A.P.G. There was some question whether the Company had not sold the shares during the war, but the Tribunal held that it had not.

The Tribunal considered the meaning of the phrase 'beneficial ownership' and decided that the interest of the shareholder in the assets of a company did not create a distinct and positive right of property in such assets. It said:

> 'the decisions of principle of the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets, other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholders, and after its winding up, a proportional share of the assets.'

After citing the *Delagoa Bay* case and other cases, the Tribunal said that they must be distinguished:

> 'in none of these cases has it been a question of granting or assigning to claimant shareholders or debenture-holders rights in any part of the corporate assets, but merely of granting them indemnity for damage caused by unjustified intervention on the part of the government. In all these cases, and notably in the first two [*Delagoa Bay* and *El Triunfo* cases] which are the most important, it was clearly specified that the shareholders and debenture-holders were admitted, in view of the circumstances, to be exercising, not their own rights, but the rights which the company, wrongfully dissolved or despoiled, was unable thenceforth to enforce; *and they were therefore seeking to enforce not direct and personal rights, but indirect and substituted rights*.'[1]

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[1] Italics mine.

V

The foregoing survey of international practice and arbitral jurisprudence shows that, in spite of many uncertainties and doubts as to the exact scope of intervention on behalf of nationals who are shareholders in foreign corporations, the admissibility of such intervention has in principle been recognized by a substantial body of authority. Before attempting, by way of conclusion, to formulate the probable state of international law in the matter, we must take account of the Claims Conventions concluded since the end of the First World War. These Conventions contain provisions enabling claims to be brought by nationals in respect of injuries sustained by them, as a result of damage inflicted upon corporations in which they hold shareholding interests. Such a provision was inserted, for the first time, in Article 297 (*e*) of the Treaty of Versailles (1919), in the following terms:

> 'The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests *including any company or association in which they are interested*, in German territory as it existed on 1st August, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated and the total compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI.'

An identical provision appears in the treaties with Austria (Art. 249 (*e*)), Bulgaria (Art. 177 (*e*)), Hungary (Art. 232 (*e*)). The language used in the words italicized (and which will be discussed below) is somewhat different from that used in Article 1 of the Treaty of Berlin, 1921, between Germany and the United States. This article incorporated (by reference) the joint resolution of the Congress of the United States of 2 July 1921. The operative part of this resolution provided that all property of the German or Austro-Hungarian Governments which was, on the outbreak of war with those countries, in the possession of the United States, should be dealt with in the following manner. It was to be retained by the United States until such time as the German and the Austro-Hungarian Governments should have made suitable provision for the satisfaction of all claims by American nationals who had suffered (through the action of these Governments) loss or damage of the following nature:

> 'loss, damage, or injury to their persons or property, whether *through the ownership of shares or stock in German, Austro-Hungarian, American, or other corporations*.'[1]

Most probably the intention of these provisions[2] was the desire to prevent the German Government from evading liability to pay Allied nationals compensation for war damage, merely on the ground that the Allied interests affected were owned through a *German* corporation; but the form of words used was such as to include a corporation of any nationality. The manner in which these provisions were construed by the Mixed Arbitral Tribunals shows that these Tribunals, taken as a whole, completely failed to grasp their significance. It would not be profitable here to discuss the relevant decisions in detail; suffice it to say that in most cases the treaty provisions were interpreted as meaning that the claim was a claim by the *company*, and that the *national character* of the claim was determined by the nationality of the majority of the shareholders or of the controlling interests.[1] One decision is an isolated exception to the misconceptions of the Mixed Arbitral Tribunals. A lucid, and undoubtedly correct, interpretation of Article 297 (*e*) of the Treaty of Versailles was given by the Anglo-German Tribunal in the case of *Weiss Biheller & Brooks Ltd.* v. *German State*,[2] the facts of which it is unnecessary to recapitulate beyond saying that it was a claim brought under Article 297 (*e*) of the Treaty of Versailles. The Tribunal said:

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[1] The words 'or other corporations' should be noted. (Italics mine.)

[2] See also the Claims Agreements between the United States and Austria (1921) and between the United States and Germany (1922): *State Papers*, vol. 116, p. 1028; ibid., vol. 120, p. 57.

> 'It seems that the object of the specific inclusion of any company or association in which the nationals of Allied and Associated Powers are interested, in Article 297 (*e*), was intended to secure compensation in respect of damage or injury inflicted upon property, rights, or interests where such property, rights or interests might have been contended to be the property, rights or interests of juridical entities technically German nationals, in spite of the fact that, as shareholders, or debenture holders,[3] or in some other way, the nationals of the Allied and Associated Powers had a real interest in such company or association. This would afford an explanation for the specific mention of companies and associations in Article 297 and the Annex thereto. The intention of the Treaty is to give to a national of any Allied and Associated Power compensation in respect of such property rights and interests as he may possess, and to the extent that he possesses them, in those juridical entities which may be German nationals.'

This is undoubtedly the true doctrine; the decisions of the other Tribunals were based on a confused (and quite false) idea that Article 297 had to be interpreted in the light of some doctrine as to the nationality of corporations, and a further confused idea that the nationality of corporations had something to do with control.

The above reasoning is confirmed by the existence of provisions in later treaties, the object of which was to give an *independent claim* to shareholders in a company bearing a 'nationality' different from that of the shareholders, or a substantial body of them, and not merely to alter, *for the purposes of*

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[1] *Société Anonyme de Charbonnage Frédéric Henri* v. *État Allemand* (*Recueil des décisions des tribunaux arbitraux mixtes*, vol. i (1921–2), p. 422); *Régie générale des Chemins de fer etc.* v. *État Bulgare* (ibid., vol. iii (1924), p. 954). Cf. *La Suédoise* v. *Roller* (ibid., p. 570) and *Chamberlain and Hookham* v. *Solar Zahlerwerke* (ibid., vol. i (1921–2), p. 723).

[2] Ibid., p. 850, at p. 853.

[3] This results from the formulation 'in which they are interested' in Art. 297 (*e*). The rule independently of treaty is probably narrower in so far as debenture-holders are concerned. See below, p. 257.

making a claim, the nationality of the corporation, or to adopt some different criterion of its nationality from that generally accepted (state of incorporation).[1] Thus Claims Conventions not connected with the war were made between 1923 and 1926 by the United States with Panama[2] and with Mexico,[3] and also with Mexico[4] by France, Germany, Spain, and the United Kingdom. These Conventions gave the right to make a claim on behalf of nationals (being shareholders) who had sustained loss by reason of damage at the hands of Mexico, to any company in which such nationals were interested. There was no reference in these Conventions to the consideration that the company was Mexican, though, in fact, the companies concerned were Mexican. The United States–Mexican Convention required the national to have a 'substantial and bona fide interest' in the corporation; the Conventions with the European states required that the nationals concerned should have 'an interest exceeding 50% of the total capital of the corporation'. The British-Mexican Convention provided that the interests of various British nationals could be added together to make up the necessary majority interest; whilst other Conventions made no such provision.

Finally, the Treaties of Peace of 1947 with Italy, Roumania, Bulgaria, Hungary, and Finland, although somewhat differently worded, and not containing the same restrictions on the bringing of claims, provide that United Nations nationals may recover such amount of the total loss suffered by any corporation (*not* being a United Nations national as defined by the treaty) as is represented by the proportion their interest bears to its total capital. Article 78, paragraph 4 (*b*) of the Italian Treaty contains the typical clause for these treaties:

> 'United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (*a*) of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph (*a*) above. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association, and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.'[5]

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[1] This distinction is well illustrated by certain cases which arose before the German-Mexican Commission. The German Agent filed claims on behalf of German nationals in respect of damage to companies in which they held shares. He filed these claims in the names of the *companies*. To all these claims the Mexican Agent objected that the companies were Mexican, and that the Tribunal had no jurisdiction. The German Agent was allowed to amend the pleadings by substituting the names of individual shareholders. A Mexican objection that this altered the nationality of the claim was overruled. See Feller, *The Mexican Claims Commissions* (1935), p. 118.

[2] *State Papers*, vol. 131, p. 604.

[3] Feller, op. cit., pp. 322, 386.

[4] Ibid., pp. 414, 445, 470, 504, 522.

[5] See, *mutatis mutandis*, treaties with Roumania (Art. 24, para. 4 (*b*)), Bulgaria (Art. 23, para. 4 (*b*)), Hungary (Art. 26, para. 4 (*b*)), Finland (Art. 25, para. 4 (*b*)).

Article 78, paragraph 9, of the Italian Treaty provides:

> '"United Nations nationals" means individuals who are nationals of any of the United Nations or corporations or associations organised under the laws of any of the United Nations at the coming into force of the present treaty, provided that the said individuals, corporations or associations also had this status on 3rd September 1943 the date of the Armistice with Italy.
>
> 'The term "United Nations nationals" also includes all individuals corporations or associations which under the laws in force in Italy during the war have been treated as enemy.'[1]

An Agreement signed on 5 December 1947 by Canada, the Netherlands, Belgium, Luxembourg, and the United States relating to the resolution of conflicting claims to German enemy assets[2] furnishes another interesting example of a treaty providing, in special circumstances, for cases in which it is necessary to 'penetrate the veil of corporate personality' in order to do substantial justice.

What conclusions can be drawn from all these treaty stipulations—extending over a period of thirty years since the end of the First World War? Surely they illustrate the existence of what may be called an international rule of equity, supplementing the normal principle of respect for the juridical personality of associations, and allowing of exceptions to it where its application would cause injustice. Such exceptions exist, as we have seen, in municipal law. They are an example of the type of case where the circumstances justify the use of private law analogy, especially when international practice tends in the same direction. To quote Hyde, the treaty stipulations set out above 'testify to the existence of a practice acknowledging the propriety of interposition *for cause*[3] on behalf of nationals interested through ownership of stock or securities under the laws of the foreign state'.[4] That distinguished but cautious writer does not, however, attempt to formulate precisely the 'causes' which, independently of treaty stipulations, would 'justify' interposition.

VI

Such is the evidence, not slight in volume, but hardly of the definite and unequivocal nature one could wish. Nor have the writers on international law devoted much attention to this theoretically interesting, and practically important, question. In a paper read to the Grotius Society[5] in 1931 Mr. W. E. (now Sir Eric) Beckett argued that an exception under international law should be recognized to the normal rule that claims in respect of injuries to a corporation may be brought on behalf of the company only by the state of which the company is a national. This exception was where the injury was inflicted by the state under whose law the corporation was formed. In an article written three years later Professor (now Judge) Charles de Visscher approved this view.[1] In that article the learned writer agrees that the normal rule is that the corporate entity is a juridical person distinct from its members, and that injuries to it should normally be the subject of claims by the corporation itself. He maintains, however, that the *raison d'être* of this rule is the following: members of a corporation which has been formed in a particular country with foreign capital have submitted themselves to the law of that country for the purpose, *inter alia*, of ensuring protection for their common interests, and they expect to claim such protection from the courts. If wrongful acts are committed as a result of which the interests of foreign nationals sustain damage, *and those nationals have exhausted local remedies*, or such remedies are ineffective, then the *raison d'être* of the normal rule disappears, and diplomatic intervention is permissible directly on behalf of the individual shareholders by the states of which they are nationals. De Visscher then continues as follows:

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[1] *Mutatis mutandis* the same definition occurs in the treaties with the other ex-enemy states mentioned above.

[2] *American Journal of International Law*, 42 (1948), p. 157.

[3] Italics mine.

[4] Hyde, *International Law* (revised ed., 1945), vol. ii, p. 908.

[5] *Transactions of the Grotius Society*, vol. xvii (1931), p. 175.

> 'En vain l'état recherché objecterait-il que la société a sa nationalité. On lui répondra que cette nationalité n'est distincte de celle des actionnaires qu'aux seules fins d'une protection légale que le droit interne s'est avéré impuissant à lui garantir. Seule désormais l'action internationale est capable d'ouvrir aux intérêts étrangers la voie des réparations exigées. Raisonner autrement c'est prêter à la personnalité morale des effets qui compromettent le but même en vue duquel elle a été constituée; c'est abuser d'une abstraction aux dépens des seules réalités qui en justifient l'emploi.'[2]

In so far as this passage suggests that the 'real' nationality of the corporation is that of the shareholders or a majority of them, it is submitted, with respect, that it probably goes too far; at any rate this would not be in accordance with British views and practice, under which the corporation is always a national of the state under whose laws it was formed. It is not necessary to assume a change in the nationality of the corporation in order to support a claim by the shareholders in the case supposed by de Visscher. The question is whether, assuming the nationality of the corporation to be *X*, and *notwithstanding that fact*, state *Y* can intervene, on behalf of its nationals who are shareholders. The suggestion that the corporation only retains local nationality up to the point that it retains local protection seems dangerous. In spite of some confusion in earlier American writing on this subject[3] it is believed that the distinction between claims on behalf of corporations as such, and on behalf of nationals who are shareholders in the corporation, is now recognized by American doctrine[1] and practice.[2] Ralston, who has studied the question as it arises before international arbitration tribunals, writes:

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[1] *Revue de droit international et de législation comparée* (3rd series), 15 (1934), p. 624.

[2] Ibid., pp. 641–2.

[3] See, for example, Borchard, *Diplomatic Protection of Citizens Abroad* (1928), p. 622.

> 'A question has arisen repeatedly as to whether the nationality of the claim is to be determined by the place of the formation of the corporation or by the nationality of the stockholders or of a majority of them.'[3]

This is a source of confusion we have already noticed.[4] But Ralston continues:

> 'A cognate question receiving consideration is as to whether the stockholders as such have a right to recovery apart from the corporation in which they have invested.'[3]

On the first point—the nationality of claims—he refers to the *Delagoa Bay* case, which, he observes, is frequently cited as an authority for the proposition that the nationality of a corporation is determined by the nationality of its stockholders. As he rightly points out, the case proves no such thing. Dealing with the second point he says:

> 'In the prior edition of this work'—he writes in 1926—'the opinion was expressed that, notwithstanding the language quoted from commissions, it might be considered that the main question had not received its solution, and that it might be finally found that equitable considerations would justify appeal by stockholders to their governments when wronged, although they were clothed by fiction of municipal law with a new personality through the existence of the corporation in which they were interested. Later events have tended to show the correctness of this view.'[3]

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VII

Any attempt to formulate precise conclusions on the subject of the present inquiry would be somewhat premature. This is a field in which international practice may well in certain respects be rather ahead of doctrine and arbitral jurisprudence, and in other respects behind them. The present writer proposes to confine himself, therefore, to some observations of a general character with a view to defining those issues upon which the law may be said to be fairly clear, and those issues upon which practice is still unsettled, whilst doctrine and jurisprudence remain either silent with regard to them, or are insufficiently developed.

It seems clear, in the first place, that there is no unlimited right of intervention on behalf of nationals who are shareholders in foreign corporations. International practice and writers agree that a corporation is the national of *some* state, and, when it suffers injury, it is that state which is entitled to present a claim on its behalf. Both the fact that it is a distinct juridical person and the fact that it is also a national of the state of incorporation, justify this principle. What exceptional cases allow intervention on behalf of nationals who are shareholders? The normal rule requires exhaustion of local remedies even before intervention on behalf of the *corporation*. Supposing, however, that the corporation is a national of the state oppressing it, and local remedies have been exhausted, then, if the normal rule is observed, the shareholders will be without possibility of redress; for, *ex hypothesi*, no state can intervene on behalf of a corporation against its own government. In such a case it is believed that modern international law is sufficiently developed to allow us to say that there is a legal right to intervene on behalf of individual shareholders. Yet even this exception may require qualification according to the nature of the injury to the corporation. It should be a real loss, already accrued, not an apprehended loss involving no provable loss to the shareholders.

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[1] See Hyde, *International Law* (revised ed., 1945), vol. ii, pp. 904, 906.

[2] Hackworth, *Digest of International Law*, vol. v (1943), p. 845, citing a dispatch of 1938 from the United States Secretary of State to the Embassy at Hankow.

[3] Ralston, *Law and Procedure of International Tribunals* (1926), p. 150.

[4] See above, p. 253, n. 1, for the reference to the practice of the German-Mexican Claims Commission, and pp. 251–2 for a discussion of the decisions of the Mixed Arbitral Tribunals.

It will be noticed that the treaty stipulations discussed above do not confine intervention to cases where the corporation is a national of the state inflicting the injury. It is submitted, however, that the present condition of international law does not justify the proposition that, independently of treaty, the rule can be stated more widely than it has been put above.

What of debenture-holders? Authority is scanty on the point. In the *Tlahualilo* case the claims of debenture-holders were taken up, although the corporation appears to have been still functioning as an entity. It is arguable that debenture-holders are mere creditors of the company generally, and that international claims on their behalf are not permissible unless the corporation, as a result of the action of the state oppressing it, has ceased to function as a juridical entity. Even then, if there is a liquidator, and if effective municipal remedies exist, there would seem to be no reason why the debenture-holders should not take action in the municipal courts. It seems as if, in the earlier arbitral decisions, excessive or mistaken emphasis was laid on the corporation being in a state of dissolution (e.g. *Delagoa Bay* case) rather than on the factor, always also present, that the injury was done by the state of which the corporation was a national, coupled with the additional factor of the absence of any local effective remedy. The fact that a corporation is 'defunct', as it was put in the *Delagoa Bay* case, is really only relevant in so far as it precludes the possibility of *effective remedy* by corporate action. This consideration really lies at the basis of the exception allowing intervention where the corporation is a national of the state oppressing it. It may be that the same consideration will permit the extension of the exception to cases where the corporation is *not* such a national, and the shareholders cannot reasonably be said to possess any effective remedy other than the intervention of their own Government. It cannot be said, however, that such an extension has, as yet, been sanctioned by international practice. It must be remembered that governments do, in fact, occasionally intervene in such cases, normally in concert with the state whose national the corporation is, and this practice may, in time, produce a settled rule.[1]

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[1] Another point on which the law is uncertain is the position where the shares of the foreign corporation are held by other companies which in turn are held in whole or in part by other companies—all companies possibly of different nationalities. This question is too involved to be dealt with here, where only the general principles governing the question of intervention have been discussed.

MONEY IN PUBLIC INTERNATIONAL LAW

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FOR some considerable time it has been obvious that there exists what may be termed an international law of money. A number of writers have given their attention to it.[1] They have done important and, indeed, indispensable spade-work. Regarding money primarily as an object of international organization they have collected and presented the facts relating to the international aspects of money, explained their regulation by treaties, stated the form and the frame. Such descriptive treatment has largely, though by no means entirely, neglected the core of the peculiarly legal problem which has to be faced. It lies in the elucidation and the development of rules of a substantive international law of money. These will be discussed in the following pages. State sovereignty over money, its ambit and limitation (Part I), the right of protection enjoyed by the members of the family of nations in respect of their currency systems (Part II), and the law of monetary obligations subject to public international law (Part III) are the principal topics which at present would seem to require investigation.

I

Money is an institution of municipal law. It is the product of the 'jus cudendae monetae belonging to the supreme power in every state'.[2]

The state's undeniable sovereignty over its currency is traditionally recognized by public international law; to the power granted by municipal law there corresponds an international right to the exercise of which other states cannot, as a rule, object. As the Permanent Court of International Justice has said,[3] 'it is indeed a generally accepted principle that a state is entitled to regulate its own currency'. Money, like tariffs or taxation or the admission of aliens, is one of those matters which prima facie must be considered as falling essentially within the domestic jurisdiction of states (Art. 2 (7) of the Charter of the United Nations). It follows that a state which changes and, in particular, depreciates its currency or restricts its currency's availability for transfers abroad or takes other measures affecting foreign creditors, does not, as a matter of customary international law, commit an international wrong for which it could be held responsible outside the realm of treaty obligations.

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[1] Nolde, 'La Monnaie en droit international public', in *Recueil des Cours de l'Académie de Droit International*, 27 (1929), p. 247; Griziotti, 'L'Évolution monétaire dans le monde depuis la guerre de 1914', ibid. 49 (1934), p. 7; Gutzwiller, *Der Geltungsbereich der Währungsvorschriften* (1940), pp. 78–92; Nussbaum, 'International Monetary Agreements', in *American Journal of International Law*, 38 (1944), p. 242.

[2] *Per* Lord Campbell in *Emperor of Austria* v. *Day* (1861), 3 De G.F. & J. 217, at p. 234.

[3] *Serbian and Brazilian Loan Cases: Publications of the Court*, Series A, Nos. 20/21, at p. 44.

This view, it is true, cannot be said to be of ancient standing. On many occasions ideas have been expressed which would seem to aim at a qualification of the state's right to form its monetary policy in a manner prejudicial to foreign nationals. In 1688 Holt C.J. refused to give effect to the depreciation of the Portuguese currency, because 'the King of Portugal may not alter the property of a subject of England'.[1] The same idea is hinted at in the remarkable Note which in 1800 John Marshall, then Secretary of State and shortly afterwards to become Chief Justice of the United States Supreme Court, sent to the American Minister to Spain for transmission to the Spanish Government. The United States Government protested against the debasement of the Spanish currency on the ground that 'between discharging a debt by paying one-half of its nominal amount, and the whole of its nominal amount possessing only one-half of its real value, there is no difference'. There was no question of a sovereign nation's absolute rights on its own territory. 'But coextensive and coeval with it is the privilege of a foreign friendly nation to complain of, and remonstrate against such acts of sovereignty as are injurious to its citizens or subjects.'[2] Even in modern times, in France and the countries influenced by her legal teaching, the curious and in reality almost meaningless statement can be found that 'les lois monétaires sont strictement territoriales'.[3] Usually the consequences which one would expect to flow from such a maxim are not being drawn, but the Supreme Court of Syria went so far as actually to hold that a contract for the payment of a sum of 'francs' made between the Syrian Government and an Egyptian firm was subject to an international rule by which legal tender legislation, enacted after the date of the contract, applied only internally and did not affect contracts with a foreigner.[4]

There cannot be any doubt, however, that such attempts to limit the international recognition of monetary changes must to-day be considered as obsolete and extravagant. All monetary obligations, whether they are expressed in domestic or in foreign currency, are subject to the principle of nominalism;[5] thus the promise to pay 10,000 French francs is satisfied by the payment of whatever are declared to be 10,000 French francs by French law. This rule of municipal law is for all practical purposes universally accepted. In order to be consistent with it, public international law must follow suit; if under all relevant systems of municipal law a debtor of 10,000 French francs can discharge his debt by the payment of what French law defines as 10,000 French francs, France cannot be said to violate any international duty by the exercise of her sovereign powers over her currency. It is therefore only natural to find that all available modern authorities proclaim the complete harmony between international and municipal law on this point by recognizing a state's unfettered rights over its currency. Thus the American-British Claims Commission, established under the Treaty of 5 May 1871, held in *Adam*'s case that, where a British subject held bonds issued by an American Railway Company and suffered a loss from the issue of greenbacks and the consequent depreciation of the dollar, 'the matters alleged in the memorial do not constitute the basis of any valid claim'.[1] Similarly, the Upper Silesian Arbitral Tribunal was concerned with the question whether the holder of a German banknote, issued before the First World War, had a vested right within the meaning of the Polish-German Convention of 1922[2] to obtain payment in gold; the Tribunal had no difficulty in giving a negative answer.[3] In a case which came before the former Supreme Court of Germany, the Italian plaintiff whose German debtor had repaid a loan in depreciated German marks claimed to be entitled to payment on a gold basis. He alleged the existence of a rule of public international law to the effect that loans made by foreigners were invariably repayable according to their gold value. Referring to the practice in England and other countries the Court summarily disposed of such an absurd contention.[4] In this connexion considerable interest attaches to the outcome of the correspondence between the British and French Governments respecting the position of the British holders of *rentes* which the French Government had issued in England between 1915 and 1918.[5] These issues resulted in cash subscriptions of approximately £50 m., but owing to the depreciation of the franc by 1930 their capital value was in the neighbourhood of £13½ m. only. The British Government pointed to the special circumstances[6] in which the bonds were issued and to the fact that the

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[1] *Du Costa* v. *Cole* (1688), Skin. 272.

[2] Moore, *A Digest of International Law* (1906), vol. vi, p. 754; on another case the facts of which are not quite clear see ibid., p. 729.

[3] This sterile statement occurs frequently in French decisions and is defended by French scholars, particularly by Arminjon, *Précis de droit international privé* (3rd ed., 1947), pp. 287, 288; the same, *Précis de droit international privé commercial* (1948), pp. 249 ff.

[4] Decision of 30 December 1931: *Annual Digest*, 1931–2, Case No. 151.

[5] See Mann, *The Legal Aspect of Money* (1938), pp. 63 ff., 191 ff. Only in exceptional cases will reference be made in the present paper to this work, which underlies such of the following

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observations as relate to the private law of money. See also Dicey, *Conflict of Laws* (6th ed. by Morris, 1949), pp. 718 ff.

[1] Moore, *International Arbitrations* (1898), vol. iii, p. 3066.

[2] Art. 4, para. 2 (3).

[3] *Muller* v. *Germany* (*Recueil des décisions des tribunaux arbitraux mixtes*, vol. ii (1923), p. 32). In *Quella* v. *Germany* the Tribunal held that exchange restrictions did not constitute an encroachment upon vested rights within the meaning of Art. 4, para. 2 (3), because by their nature they were only temporary emergency measures (ibid., vol. vi (1927), p. 164).

[4] Decision of 6 June 1928 (*Entscheidungen des Reichsgerichts in Zivilsachen*, vol. 121, p. 203, and *Annual Digest*, 1927–8, Case No. 230).

[5] Cmd. 3779.

[6] See Samuel, *The French Default* (1930).

French Government demanded from the Governments indebted to it payment in gold francs, and suggested 'an equitable measure of compensation' to the British holders of the *rentes*. As the French reply emphasized, the British Government did not at first try to impugn the legal correctness of the French attitude, but in a subsequent communication the British Government suggested submission of the dispute to an arbitrator 'to decide the equitable and just basis upon which, having regard to all circumstances affecting the case and to international custom' payment should be made. In their final answer the French said that the 'request for an arbitration which aims at increasing, on grounds of equity, the amount which a country is bound to pay in law, constitutes a real innovation'. They added that 'the determination both of the financial policy of a State, so long as that policy is not disputed on grounds of law, and of any measures of equity which it may be considered proper to take in connexion with that policy, is entirely a matter for the State in question, i.e. in the present case, for France'. The French Government concluded that their refusal to agree to the British proposal was dictated 'by the legitimate reluctance to call into question, when not obliged by any grounds of law or of equity to do so, a reform which has assured monetary stability in France'. There the matter rested. The significance of the correspondence lies in the fact that the British Government did not rely on any rule of law or equity in support of its case; if an arbitrator had been appointed to decide upon a delictual claim for damages, no such rule, nor any 'international custom', would have guided him; his task would have been an impossible one. The British Government may perhaps be assumed to have accepted this in the end.

If, then, as a matter of principle, the state's power as well as right over its currency system is indubitable,[1] the question arises whether and to what extent international law has grafted exceptions upon the rule.

The first exception results from the doctrine of abuse of rights. If the monetary legislation or practice of a country pursues the deliberate purpose of injuring foreigners, this amounts to an international delinquency. Thus, if it were true[2] that during the years 1921 to 1923 the German Government deliberately created, or at least aggravated, the inflation of the mark, so that it assumed its well-known astronomical proportions, for the purpose of eliminating Germany's foreign indebtedness, such policy would have been condemned by international law. Or when, after 1918, Poland introduced in her newly acquired western provinces a rate of exchange of 1 mark = 1 zloty for the conversion of mark debts into Polish currency, German courts refused to apply the prescribed rate on the ground that it was directly intended to injure German subjects.[1] Similarly, a German Statute of 1936 abrogating the gold clause in certain cases was considered by the Swiss Supreme Court as discriminating against foreigners and therefore refused recognition in Switzerland.[2] To the recent amplification of the rule of non-discrimination by the Articles of Agreement of the International Monetary Fund reference will be made below.[3]

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[1] For an exception see the German-Swiss Mortgage Treaties of 6 December 1920 and 25 March 1923 (*Nouveau Recueil général des traités*, 3rd series, vol. xv, pp. 812 and 817), on which see Nussbaum, *Money in the Law* (1939), p. 401. These were concluded in quite unusual circumstances and are of no permanent interest. Nor is the general principle in any way affected by the provisions in the Peace Treaties of 1920 according to which debts due to nationals of victorious nations were payable at the pre-war rate of exchange or in gold (Art. 296 (4) (*d*) of the Treaty of Versailles; Art. 248 of the Treaty of St. Germain; Art. 176 of the Treaty of Neuilly, and Art. 231 of the Treaty of Trianon). No similar provision is contained in the Paris Peace Treaties of 1947. The Financial Agreement between the United Kingdom and Italy made in Rome on 17 April 1947 in pursuance of Art. 79 of the Treaty of Peace with Italy (Cmd. 7118) provides by Clause 14 that the rate of exchange for the payment of lire debts 'will be that current when the debt became due'.

[2] This suggestion has sometimes been made, but has not been proved. Quigley and Clark thought it was 'beside the point to discuss whether Germany deliberately forced on the depreciation

This leads to the second qualification to which the rule of customary public international law is subject, viz. those numerous treaties which, particularly in the course of the last decade, have come to be concluded and may be destined to have far-reaching effects upon the development of the law.

In this connexion very little is to be gained from an historical approach. Originally the object of the contracting states was to unify their currency systems on a regional level in the sense not of merging independent systems into a single one, but of arranging them on a common basis. Attempts in this direction have a long history[4] and were renewed with a substantial measure of success in the course of the nineteenth century when they led to the establishment of several monetary unions.[5] The Latin Monetary Union (1865–1921) between France, Belgium, Switzerland, Italy, and Greece acquired the greatest significance. It constituted 'l'état d'union pour ce qui regarde le poids, le titre, le module et le cours de leurs espèces monnayées d'or et d'argent', and resulted in the circulating currency of each member being to some extent legal tender in the other member states; but monetary policy in general, especially the issue of paper money, was in no way uniformly controlled. The breakdown of the Union followed in the wake of the First World War. It was then that the public came to be disabused of the illusion that the Union was in fact a union and had created the so-called international franc as a currency common to all members, and

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of the mark as a method of avoiding payment of reparations' (*Republican Germany* (1938), pp. 173 and 174).

[1] Berlin Court of Appeal, 25 February, 4 March, 4 April, and 28 October 1922 and 2 February 1928. Reported in *Juristische Wochenschrift*, 1922, pp. 398, 1131, 1134; 1923, p. 128; 1928, p. 1462.

[2] Decision of 1 February 1938 (*Entscheidungen des schweizerischen Bundesgerichts*, 64, II, p. 88).

[3] See p. 267.

[4] See, in particular, Nussbaum in the paper mentioned on p. 259, n. 1.

[5] For references and literature see Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 887.

had to realize that in law the monetary systems had remained separate and that the sovereignty of members in monetary matters had not been restricted by the Union.[1]

Again, the lawyer cannot derive any real benefit from declarations of a programmatic character which express political aims or factual ties rather than legal rules. In this connexion one will think primarily of the arrangements which govern the sterling bloc or, as it is now being called, the sterling area or, in the words of the Exchange Control Act, 1947, the scheduled territories. No material seems to have been published which would indicate the existence of legal ties or permit a legal analysis of their nature and practical operation;[2] it is, however, a well-known fact that the foreign exchange resources of the sterling area are subject to pooling arrangements[3] which, by the Anglo-American Agreement of 6 December 1945, were to be loosened[4] and which, for the first time, were seriously interfered with by the remarkable Agreement between the United Kingdom and Ceylon: under the heading of Monetary Co-operation the two Governments recognized 'that Ceylon is at all times free to dispose of her current earnings abroad'; the United Kingdom Government agreed 'that Ceylon may retain from that surplus an independent reserve of gold or dollars' which during the period ending 30 June 1950 should amount to no more than one million dollars; 'subject to this, Ceylon intends to contribute her surplus dollar earnings to the foreign exchange resources of the scheduled territories'.[5] The pronouncements to be mentioned here are more clearly exemplified by the Declaration establishing the 'gold bloc' which between 1933 and 1936 was formed by France, Belgium, Italy, the Netherlands, Switzerland, and Poland. These states confirmed 'their intention to maintain the free functioning of the gold standard in their respective countries at the existing gold parities and within the framework of existing monetary laws. They ask their Central Banks to keep in close touch to give the maximum efficacy to this Declaration'.[6] In 1936 a Declaration which was still more frankly political was made by the United States of America, France, and Great Britain, and subsequently adhered to by Belgium, Switzerland, and the Netherlands. These states reaffirmed their intention to continue their monetary policy 'one constant object of which is to maintain the greatest possible equilibrium in the system of international exchanges and to avoid to the utmost extent the creation of any disturbance of that system by British (French, &c.) monetary action'. The participating states also extended an invitation to other nations 'to realize the policy laid down in the present Declaration'.[1] Such Declarations do not, nor are they intended to, impose any legal fetters upon the states' sovereignty in monetary matters.

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[1] For references see Mann, op. cit., pp. 41, 42.

[2] See generally Bareau, *The Sterling Area* (1948), a short but useful survey.

[3] For a reference to the 'sterling area dollar pool' see Clause 7 of the Financial Agreement between the United Kingdom and the United States of America of 6 December 1945 (Cmd. 6708). For a reference to the gold reserves of the sterling area see the Anglo-Egyptian Financial Agreement of 31 March 1949 (Cmd. 7675), Letter No. 1.

[4] See the preceding note.

[5] Agreement of 5 August 1949 (Cmd. 7766).

[6] *Documents on International Affairs*, 1933, p. 45. This Declaration was supplemented by a Protocol of 20 October 1934 (Hudson, *International Legislation*, vol. v, No. 396, where some literature will also be found).

Finally, for present purposes agreements of a merely technical character should be disregarded. They lay down temporary expedients or machinery, but are not intended to make a definite contribution to the development of an international monetary system. Thus, when Nazi Germany failed to make payment for goods imported from the United Kingdom, a Payments Agreement was concluded whereby Germany undertook, *inter alia*, to earmark 55 per cent. of the value of her exports to the United Kingdom to discharge German commercial debts.[2] On the same level are those numerous Clearing Agreements which, before the outbreak of war in 1939, became so prominent a feature of German commercial policy and which have rightly been criticized for their prejudicial effect upon world trade.[3] A whole clearing system came into being[4] which even the United Kingdom was compelled to adopt in its dealings with Roumania,[5] Italy,[6] Turkey,[7] and Spain.[8] Although Clearing Agreements give rise to many difficult problems of law and have led to an extensive literature, particularly in Switzerland, they do not require more than mention, as they seem to have disappeared from the international scene.

The modern development of an effective public international law of money stems from the Articles of Agreement of the International Monetary Fund concluded in 1944 at Bretton Woods.[1] Inaugurating an era of monetary co-operation and aiming at stability of exchange in the interest of world trade, they have set up a scheme which has imposed well-defined duties upon the participating states and thus brought about a concomitant restriction of their sovereignty in currency matters—a development which is emphasized not only by such multilateral treaties as the Convention for European Economic Co-operation[2] and the General Agreement on Tariffs and Trade, adopted at Geneva in 1947,[3] but also by a number of bilateral agreements. This body of treaty law has resulted in so complicated a system that those who have no inside information, but have to rely on their own resources and their own research, find difficulty in understanding its implications and, indeed, in keeping pace with its rapidly changing and progressing evolution. Yet it would appear that a few legal rules have become clearly discernible.

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[1] *Documents on International Affairs*, 1936, p. 668.

[2] Anglo-German Payments Agreement of 1 November 1934 (Cmd. 4963) as amended by the Agreement of 1 July 1938 (Cmd. 5787); see also the Anglo-German Transfer Agreements of 4 July 1934 and 1 July 1938 (Cmd. 4640 and 5788).

[3] The Swiss Federal Tribunal said that Switzerland had entered into the Clearing Agreement with Germany 'in a position of constraint; she had to make an effort to attenuate, through counter-measures and international agreements, the disastrous effects of German exchange control legislation' (Decision of 8 October 1935, *Entscheidungen des schweizerischen Bundesgerichts*, 61, II, p. 242, at p. 248, translation by Nussbaum, *Money in the Law* (1939), p. 513).

[4] For references see Nussbaum, op. cit., pp. 507 ff., the best and perhaps the only source of legal information on this topic in the English language.

[5] Clearing Office (Roumania) Order 1936, S.R. & O. 1936, No. 427, as amended by S.R. & O. 1936, No. 1306; 1938, No. 235 and No. 908; 1939, No. 750; and 1940, No. 963, in each case with the Agreements in the Schedule. All these Orders were made under the Debts Clearing Office and Import Restrictions Act, 1934.

[6] Clearing Office (Italy) Order 1936, S.R. & O. 1936, No. 696, as amended by S.R. & O. 1936, No. 1193; 1938, No. 234; and 1943, No. 1436, in each case with the Agreements in the Schedule.

[7] Clearing Office (Turkey) Order 1936, S.R. & O. 1936, No. 1251 as amended by S.R. & O. 1938, No. 580; 1940, No. 31 and No. 208; 1945, No. 559, in each case with the Agreements in the Schedule.

[8] Clearing Office (Spain) Order, 1936, S.R. & O. 1936, No. 2, as amended by S.R. & O. 1936, No. 557 and No. 1305; 1940, No. 456; 1941, No. 944; 1942, No. 1419; and 1947, No. 590, again with the Agreements in the Schedule.

1. No member of the International Monetary Fund may at its discretion change its currency's par value.

The par value of the currency of each member is expressed in terms of gold or of the United States dollar of the weight and fineness in effect on 1 July 1944. It forms the basis of all gold purchases and foreign exchange dealings by members, each of whom has also undertaken 'through appropriate measures consistent with this Agreement to permit within its territories exchange transactions between its currency and the currencies of other members only' on the basis of par values. These may be changed only after consultation with the Fund on the proposal of a member made for the sole purpose of correcting a 'fundamental disequilibrium'.[4] If the proposed change exceeds 10 per cent. of the initial par value, the Fund is normally entitled to object, and if such objection is disregarded, the member is in the last resort subject to 'compulsory withdrawal', i.e. expulsion.[5] These provisions are supplemented by a general obligation 'to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members and to avoid competitive exchange alterations';[6] for many of the members they are reinforced by Article 7 of the Convention for European Economic Co-operation which enjoins each Contracting Party to 'take such steps as lie within its power to achieve or maintain the stability of its currency and of its internal financial position, sound rates of exchange and, generally, confidence in its monetary system'. They are further amplified by bilateral agreements of which only those made by the United Kingdom can be considered here. They include agreements with Belgium,[1] Sweden,[2] France,[3] the Netherlands,[4] Czechoslovakia,[5] Norway,[6] Switzerland,[7] Portugal,[8] and Spain.[9, 10] All these Monetary Agreements establish an official rate of exchange between the two currencies concerned and contain the clause that 'in all territories where they have jurisdiction the Contracting Governments shall enforce the use of the official rate as the basis of all transactions involving a relationship between the two currencies'. The Agreements with Belgium, France, the Netherlands, Czechoslovakia, and Spain provide that the official rate shall not be varied 'except after mutual consultation', while in the case of Sweden, Norway, Switzerland, and Portugal a variation of the official rate is allowed only 'after giving to the other [Government] as much notice as may be practicable'.

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[1] Cmd. 6546. [2] Cmd. 7388. [3] Cmd. 7258.

[4] The meaning of this conception is obscure. See, for example, Mossé, *Le Système monétaire de Bretton Woods* (1948), p. 35, a useful book by an economist which contains references to the still rather scanty literature on the Fund. See also Halm, *International Monetary Co-operation* (1945). For a survey of suggestions for an international money see Blagoyevitch, *Le Problème d'une monnaie internationale* (1929); Trimborn, *Der Weltwährungsgedanke* (1931).

[5] On the foregoing see Art. IV; on the Agreement in general see Mann, 'International Monetary Co-operation', in this *Year Book*, 22 (1945), p. 251.

[6] Art. IV, Section 4 (*b*).

2. No member of the International Monetary Fund shall engage in, or permit its fiscal agencies to engage in, any discriminatory currency arrangements or multiple currency practices except as authorized by the Agreement or approved by the Fund (Article VIII, Section 3).

The essence of this obligation to observe equality of treatment is not wholly new, but it formalizes what is already implied in the general duty of co-operation imposed by the post-war treaties. An interesting aspect of this duty arises from the Exchange of Letters which accompanied the Anglo-Egyptian Financial Agreement of 31 March 1949.[1] The Egyptian Government claimed that Egypt's sterling balances held in London 'should have the benefit of a gold clause identical to that granted to some other countries'. It is not known which other countries the Egyptian Government had in mind, but the Payments Agreement between the United Kingdom and Uruguay of 15 July 1947[2] does provide in Article 12 that a sum of £17 m. held by the Central Bank of Uruguay with the Bank of England on its No. 2 Account 'shall continue to enjoy the existing gold guarantee', and the Anglo-Argentine Agreements on Trade and Payment secure to the Argentine Republic the right to enjoy 'the existing guarantee' and a 're-valuation guarantee'.[3]

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[1] Agreement of 5 October 1944 (Cmd. 6557).

[2] Agreement of 6 March 1945 (Cmd. 6604), as extended on 14 July 1947 (Cmd. 7170).

[3] Agreement of 27 March 1945 (Cmd. 6613), as amended and extended on 29 April 1946 (Cmd. 6809) and 3 December 1946 (Cmd. 6988). This superseded the Agreement of 12 December 1939 (*The Times* newspaper, 13 December 1939, p. 3) whereby England and France undertook, *inter alia*, not to alter the rate of exchange during the war.

[4] Agreements of 7 September 1945 (Cmd. 6681); 12 and 16 September 1946 (Cmd. 6921); 26 February 1947 (Cmd. 7051) and 6 September 1948 (Cmd. 7531).

[5] Agreements of 1 November 1945 (Cmd. 6694); 3 July 1947 (Cmd. 7174); 27/30 April 1949 (Cmd. 7719); 4 July/4 August 1949 (Cmd. 7772). The Agreement at present in force is the Sterling Payments Agreement of 18 August 1949 (Cmd. 7781).

[6] Agreement of 8 November 1945 (Cmd. 6697), supplemented by the Agreements of 9 July 1948 (Cmd. 7474) and 31 March 1949 (Cmd. 7672).

[7] Agreement of 16 April 1946 (Cmd. 6798).

[8] Agreements of 12 March 1946 (Cmd. 6756) and 14 April 1949 (Cmd. 7713).

[9] Agreements of 28 March 1947 (Cmd. 7090) and 26 June 1947 (Cmd. 7160). Both Agreements came to an end on 26 June 1948 (Cmd. 7449).

[10] The completeness or correctness of the above list cannot be guaranteed. The Agreements only constitute a framework which is filled in by administrative regulation and practice. In the absence of published material it is impossible to obtain a reliable picture of their application and working in practice. The economic policies expressed and pursued by them are beyond the scope of this paper. In addition to the above Monetary Agreements the United Kingdom has also concluded Payments Agreements, e.g. with Poland on 2 March 1948 (Cmd. 7352), the Soviet Union on 27 December 1947 (Cmd. 7431), Italy on 26 November 1948 (Cmd. 7587 as prolonged by Cmd. 7775) (see, generally, Bareau, 'British International Payments Agreements', in *The Pattern and Finance of Foreign Trade* (1949), p. 68), and numerous Financial Agreements, e.g. with France (27 March 1945, Cmd. 6613; 29 April 1946, Cmd. 6809; 3 December 1946, Cmd. 6988), Iraq (28 May 1945, Cmd. 6646; 13 August 1947, Cmd. 7201), Egypt (30 June 1947, Cmd. 7163; 31 March 1949, Cmd. 7675), Uruguay (15 July 1947, Cmd. 7172).

3. It is a paramount duty of the members of the International Monetary Fund to achieve and maintain a multilateral system of payments in respect of current transactions.

The Articles of Agreement proclaim this as one of the Fund's principal purposes, incidental to the overriding object of promoting international trade.[4] They do not express a corresponding legal duty in general terms similar to those accepted by the parties to the Convention for European Economic Co-operation; these undertook the obligation 'to achieve as soon as possible a multilateral system of payments', and 'to correct or avoid excessive disequilibrium in their financial and economic relations both amongst themselves and with non-participating countries'[5]—an obligation partly implemented by the remarkable Agreement for Inter-European Payments and Compensations which establishes something in the nature of a banker's clearing on an international scale.[6]

The International Monetary Fund's approach to the problem is specific rather than general. It has adopted as fundamental the distinction between current transactions and capital transfers.[7] In respect of the latter it does not interfere with its members' sovereignty, but in respect of the former it imposes positive duties.

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[1] Cmd. 7675.

[2] Cmd. 7172.

[3] Agreement of 12 and 19 February 1948, Art. IV (*e*) and (*f*) (Cmd. 7346), Agreement of 27 June 1949, Arts. 21 and 26 (Cmd. 7735). Similar guarantees were apparently given to Iran and Portugal (*The Economist*, vol. clvii (1949), p. 682, where it is estimated that as the result of the devaluation of sterling on 18 September 1949 it will cost the United Kingdom £86m. to implement these guarantees).

[4] Art. I (i) and (iv).

[5] Cmd. 7388, Art. 4.

[6] Cmd. 7546; on the Drawing Rights of Turkey see the Agreement of 25 January 1949 (Cmd. 7652). The Agreement at present in force is that dated 7 September 1949 (Cmd. 7812). See also the Economic Co-operation Agreement between the United Kingdom and the United States of America of 6 July 1948 (Cmd. 7469) and the Reports (Cmd. 7570, 7654, and 7776). The scheme has been described by Dacey, 'Intra-European Payments', in *The Pattern and Finance of Foreign Trade* (1949), p. 88.

[7] On these terms, the interpretation of which may be disregarded for present purposes, see the paper mentioned on p. 266, n. 5.

The regulation of capital movements is almost entirely left to the discretion of members. No member, it is true, may ordinarily make 'net use' of the Fund's resources for capital transfers,[1] but members 'may exercise such controls as are necessary to regulate international capital movements'.[2] The freedom so conceded has been fully turned to account in the nine Monetary Agreements to which the United Kingdom is a party; each of them contains a clause according to which 'the two Contracting Governments shall co-operate with a view to assisting each other in keeping capital transactions within the scope of their respective policies and in particular with a view to preventing transfers between their areas which do not serve direct and useful economic or commercial purposes'.[3]

On the other hand, payments and transfers for current transactions shall, in principle, be free from restrictions.[4] Exceptions are permitted only with the approval of the Fund or in respect of a currency which has been formally declared scarce or during the post-war transitional period.[5] The last is the crucial exception, because the duration of the transitional period has not been defined. Five years after the date on which the Fund began operations (1 March 1947), however, and in each subsequent year any member retaining restrictions 'shall consult the Fund as to their retention', and if the Fund finds that the member persists in maintaining restrictions inconsistent with the purposes of the Fund, the member is subject to expulsion. Even during the transitional period members 'shall take all possible measures to develop such commercial and financial arrangements with other members as will facilitate international payments and the maintenance of exchange stability'.[6] It was no doubt in pursuance of the aims contemplated by this clause that the United Kingdom entered into the nine Monetary Agreements to which reference has been made.[7] None of them specifically mentions current transactions. Moreover, very little is known about the actual practice prevailing either here or abroad in giving effect to the agreements. Nor should the impact of quantitative restrictions of imports be lost sight of. Yet there is no doubt that in fact current transactions are to-day in a privileged position[8] and that at any rate the receipt of goods and services without the corresponding transfer of payments has come to be regarded as a breach of faith and duty.

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[1] Art. VI, Section 1.

[2] Art. VI, Section 3. No obligation to restrict capital transfers is expressed by or can be inferred from the Articles of Agreement.

[3] Art. VI of the Agreements with Belgium, Sweden, and the Netherlands; Art. 5 of the Agreements with Norway and Czechoslovakia; Art. 7 of the Agreements with Portugal, Switzerland, and Spain; Annex, Clause V, of the Agreement with France; similarly letter No. 19 attached to the Anglo-Egyptian Financial Agreement of 31 March 1949 (Cmd. 7675).

[4] Art. VIII, Section 2; Art. VI, Section 3.

[5] Art. VIII, Section 2.

[6] Art. XIV.

[7] See above, p. 267.

[8] The Monetary Agreements concluded by this country do not make this apparent. See, however, the Agreements with Egypt, Iraq, and Uruguay, referred to above (p. 267, n. 10).

It is the inevitable consequence of these principles that both the International Monetary Fund and the Convention for European Economic Co-operation condemn exchange restrictions 'which hamper the growth of world trade'.[1] At least in so far as current transactions are concerned, there is no legal warrant for the tendency to regard such enactments as the Exchange Control Act, 1947, as a permitted instrument of permanent policy rather than a temporarily tolerated emergency measure.[2]

These, it is true, are rules of law which are derived from treaties and are therefore prima facie binding only on the parties to them. It is, however, a well-known phenomenon that at a certain point treaty law may become customary international law. It is usually difficult to define the precise point at which the legal conscience of the family of nations as a whole can be said to be so pervaded with the provisions of a treaty as to accept them as universally binding. If they are observed for a prolonged period, if they find their way into an ever-growing number of treaties, if they are in line with cognate movements for international co-operation and organization such as the Havana Charter[3] or the European Council,[4] then a common international code of conduct may indeed emerge. It has not yet emerged, and the International Monetary Fund, frequently treated with much scepticism, still has to stand the test of a crisis.[5] Yet over a large field it is no longer possible to describe money as a matter solely or even essentially falling within the jurisdiction of the state. This, as is well known, is a relative question. As Professor Lauterpacht has said,[6] 'in the modern age of economic and political interdependence most questions which, on the face of it, appear to be essentially domestic are in fact essentially international'. Money, being by its very nature a symbol of reciprocity and relativity,[7] is pre-eminently apt to pass into the sphere of international interdependence.

[1] Art. I (iv) of the former and Art. 4 of the latter Agreement.

[2] See Mann, 'The Exchange Control Act, 1947', in *Modern Law Review*, 10 (1947), p. 411.

[3] Cmd. 7375.

[4] Cmd. 7686.

[5] At the moment of writing these lines the effects of the crisis of sterling in the summer of 1949 cannot yet be estimated. The manner of the British devaluation evoked a certain amount of criticism, particularly in France where the new sterling–dollar rate was described as a trade-war rate and the British initiative in this matter was condemned as unilateral and as a breach of intra-European collaboration (*The Economist*, vol. clvii (1949), at p. 681). The British Government merely gave one day's notice of its intention to devalue (Hansard, *Parliamentary Debates*, House of Commons, 27 September 1949, col. 10). This was hardly within the letter or the spirit of this country's undertakings discussed in the text. See the letter from Mr. John Foster in *The Times* newspaper, 3 October 1949. Cf. Williams, 'International Effects of Devaluation', in *World Affairs*, iv (1950), p. 23.

[6] *Recueil des Cours de l'Académie de Droit International*, 70 (1947), p. 25.

[7] Simmel, *Die Philosophie des Geldes* (3rd ed., 1920), p. 98.

II

It would at present not be possible to maintain that a state owes to other states a general duty of affording protection to their monetary systems. The existence of such a duty could be asserted only if the development of international law had progressed so far as to outlaw all activities injurious to a foreign state or even to demand the adoption of positive measures to safeguard a foreign state's interests. This is not the present position. It is, however, well recognized that in special circumstances an international duty of protection may come into existence. Discussion usually concentrates on revolutionary or terrorist activities, boycott, or the preparation of war;[1] it is in no way inconceivable that financial practices may acquire a character which would justify international law in requiring their suppression. When the Hungarian revolutionary Louis Kossuth had bank-notes printed in England with the avowed object of introducing them into Hungary upon his return to that country, and had them inscribed: 'in the name of the nation: Louis Kossuth', the Emperor of Austria instituted proceedings in the English courts claiming an injunction and other relief. From a strictly legal point of view his claim was not free from doubt. He alleged, and the Court found, an infringement of his proprietary rights,[2] but it is significant that Lord Campbell felt it necessary also to hint at the broad ground 'that in an English Court of Justice the manufacturing in England of such notes for such a purpose . . . cannot be defended'.[3] Moreover, in days of a free money market, concerted speculations designed to undermine the international value of a foreign currency may constitute acts of hostility which could be said to engage the international responsibility of a state. In the nature of things these will be exceptional cases which will have to be judged in the light of the peculiar circumstances surrounding them; their treatment will not be beyond the power of traditional international law. The very absence of a general duty of protection, however, makes it clear that to-day the purpose of research must lie in ascertaining whether a state is under any specific duties towards foreign monetary systems.

1. There is certainly one such duty which has become firmly established in public international law: it is the responsibility of every member of the family of nations to prevent and punish the counterfeiting of a foreign state's currency.

This rule, apparently first propounded by Vattel,[4] was recognized by the Supreme Court of the United States in 1887:[5]

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[1] Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 259 ff.

[2] *Emperor of Austria* v. *Day* (1861), 3 De G.F. & J. 217.

[3] Ibid., at p. 236.

[4] *The Law of Nations* (translation by Fenwick, 1916), p. 46.

[5] *United States* v. *Arjona* (1880), 120 U.S. 479, at p. 483.

> 'The law of nations requires every national Government to use "due diligence" to prevent a wrong being done within its own dominion to another nation with which it is at peace or to the people thereof; and because of this, the obligation of the one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized.'

At the time the Court's view may have been 'hardly sufficiently documented',[1] but it represented a courageous and far-sighted pronouncement the correctness of which is not now open to doubt. The Convention for the Suppression of Counterfeiting Currency, concluded under the auspices of the League of Nations in 1929,[2] has substantially become part of the law of very many countries. It has formalized the broad principles of modern public international law on this point. There may be differences of detail, but they are of small significance so long as the practice of the various states in general conforms to the rules established by the Convention.

2. This does not, however, affect the question whether it is a legitimate means of warfare to counterfeit the enemy's currency for the purpose of destroying his monetary system and credit. A few cases of such counterfeiting seem to be on record.[3] They have attracted little attention and still less condemnation and cannot, therefore, at present be stigmatized as contrary to international law.

On the other hand, the duties of a belligerent occupant towards the occupied territory's currency have become more clearly defined. There are three courses open to him: he may allow the territory's currency to remain in circulation or he may create a new currency or he may use his own currency in the occupied region, and these methods may be combined. His decision must be determined not by any principle of the law of money, but by the terms and the spirit of the Hague Regulations, particularly Article 43, according to which he must 're-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.

At first sight this provision speaks in favour of the retention of the occupied region's own currency system. Yet this will frequently be impracticable, for instance when, as happened during the German occupation of Belgium between 1914 and 1918, the printing plates of the occupied territory's central bank as well as the assets covering the circulating notes are removed abroad,[4] or when gold, securities, and other cover of the currency are strictly the property of the occupied state and have lawfully been taken over by the occupant.[1]

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[1] Nussbaum, *Money in the Law* (1939), p. 34.

[2] Hudson, *International Legislation*, vol. iv, p. 2692; for literature see Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 300.

[3] Nussbaum, op. cit., pp. 158, 159, with references.

[4] Feilchenfeld, *The International Law of Belligerent Occupation* (1942), pp. 70 ff.; Nolde, op. cit., pp. 306 ff.; Neumeyer, *Internationales Verwaltungsrecht*, vol. ii, pp. 245 ff.; Nussbaum, op. cit., pp. 159 ff. All these writers have collected a large bibliography. An illuminating description of the facts is given by Schacht, *The Stabilization of the Mark* (1927), pp. 26–8. The German

In such or similar circumstances the adoption of the second of the above-mentioned solutions, i.e. the introduction of a new currency, cannot be considered as unlawful. No objection can therefore be taken to the mere fact that during the occupation of Belgium in the First World War the Germans entrusted the issue of new Belgian bank-notes to a private bank, the Société Générale, and promulgated a decree attributing the quality of legal tender to them. The real problem in this case is not the legality of the issue, but is one of cover; where should the occupant find cover for the new issue? In the Belgian situation from 1914 to 1918 the Germans secured the notes by opening at the Reichsbank a mark credit in favour of the Société Générale. This deposit, amounting to 1,600m. marks, was subsequently transferred to the Belgian Government, but, as a result of the depreciation of the mark, became worthless. The ensuing controversy between the Belgian and German Governments was settled only by the Convention of 13 July 1929[2] whereby Germany undertook to pay to Belgium certain annuities by way of indemnity. But there is force in Professor Nussbaum's submission that the Treaty of 1929 'can hardly be considered a precedent for the future'.[3] If the issue of notes as such was authorized by the Hague Regulations and if it is admitted that the depreciation of the mark in itself did not afford a ground for relief, the breach of duty could only be found in the selection of a mark deposit as coverage. The alternative, however, would have been to use Belgian assets as cover. It would not necessarily have been a less harmful solution than the use of the occupant's own

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Supreme Court held that the measures taken by the Germans in Belgium in 1914 were consistent with Art. 43 of the Hague Regulations (Decision of 22 April 1922, *Juristische Wochenschrift*, 1922, p. 1324; Decision of 20 December 1924, *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. 109, pp. 357, 360).

[1] See Art. 53 of the Hague Regulations. It is often difficult to define the conditions in which a country's monetary reserve is the property of the occupied state. For literature see Oppenheim, *International Law*, vol. ii (6th ed., revised by Lauterpacht, 1944), p. 309, n. 2. There exists a tendency to attach, in this connexion, too much importance to legal forms rather than functions. The interpretation which the Allies placed upon the term 'monetary gold' does not support that tendency: see the decision of Jenkins J. (as he then was) in *Dollfus Mieg & Co.* v. *Bank of England*, [1949] 1 Ch. 369, 392, where it was decided that gold possessed by the Governments of the United Kingdom, the United States of America, and France was held for public purposes within the meaning of the rules of immunity, although it admittedly belonged to the plaintiffs at the time of its seizure by the Germans and may still have belonged to them at the date of the writ. The Court of Appeal reversed the decision on other grounds: [1950] 1 All E.R. 747.

[2] *Nouveau Recueil général de traités*, 3rd series, vol. xxiv (1931), p. 527. The parties concluded the Convention 'tout en maintenant chacun leur point de vue juridique'. From the point of view of international law the Convention is inconclusive also because it relates not to the specific question discussed in the text, but generally to 'les questions encore pendantes entre l'Allemagne et la Belgique et relatives aux dommages économiques spéciaux résultant de l'occupation de celle-ci'. See also the Roumanian-German Agreement of 11 November 1928 (ibid., vol. xxi, p. 484) whereby Germany undertook, *inter alia*, to settle all outstanding financial questions by the payment of RM 75·5m.

[3] Op. cit., p. 160.

deposit. Allied practice during the Second World War not only confirms the proposition that the mere introduction of a new currency is not, as a rule, open to criticism, but also indicates a method of providing cover which is not essentially different from that adopted by Germany in Belgium between 1914 and 1918. The Allies issued Allied Military Currency denominated in the currency of the occupied territory[1] (lire,[2] reichsmarks,[3] schillings[4]) and gave it the force of legal tender. At any rate in so far as Allied Military lire were concerned, both the British and the United States Governments caused the equivalent of the lire issued in Italy to be credited, in sterling and dollars respectively, to special accounts to provide for the contingency of the lire in the future becoming a charge against the occupying Powers.[5] On the other hand, during the last war the Germans organized new central banks in most of the occupied countries and, having (probably unlawfully)[6] appropriated the existing banks' gold and other reserves, admitted German currency and credits with the Reichsbank as cover, although in Poland they also created a mortgage on all real estate in the territory in favour of the new central bank.[7] In so far as the creation of the new central banks and their equipment with cover in the form of German credits were merely the consequence of the illegal spoliation of the original central banks' assets and an incident of the scheme to enrich the occupant and strip the territory of its resources, Germany clearly committed a breach of her international duties.[8] In the Philippines, in Burma and in other countries occupied by them, the Japanese issued military currency. Although nothing is known about its cover, there is no reason to doubt the legality of the issue.[9]

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[1] See, generally, Kemmerer, 'Allied Military Currency in Constitutional and International Law', in *Money and the Law, Supplement to the New York University Law Quarterly Review* (1945), p. 83; Southard, *The Finances of European Liberation* (1946).

[2] See Smith in this *Year Book*, 21 (1944), p. 151, at p. 153, and, in particular, Professor Southard's book (quoted in the preceding note) which is written with special reference to Italy. See also Holborn, *American Military Government* (1947), who at pp. 114 ff. prints the Combined Directive on Military Government in Sicily dealing in detail with matters of currency.

[3] Law No. 51, Military Government Gazette, Germany, 21st Army Group Area of Control, p. 16; see also Southard, op. cit., *passim*. For the text of the Combined Directive for Military Government in Germany see Holborn, op. cit., pp. 135 ff.

[4] See Southard, op. cit. For the American Directive on Military Government in Austria see Holborn, op. cit., pp. 177 ff.

[5] Southard, op. cit., p. 25.

[6] Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 57, 58, who attaches decisive importance to the fact that the central banks concerned were privately owned. But see p. 273, n. 1 above.

[7] See Lemkin, op. cit., pp. 53 ff., who at pp. 267 ff. prints the relevant texts.

[8] Ibid., pp. 55, 56. The Supreme Court of Poland held that the introduction of the Polish Mark in occupied Poland by Germany during the First World War was not permitted by Art. 43 of the Hague Regulations (Decision of 28 August 1919, *Juristische Wochenschrift*, 1922, p. 1689). The opposite view was taken by the German Supreme Court in a decision which contains interesting material on the issue of 'Darlehenskassenscheine' in Poland in 1916 (Decision of 28 November 1921, *Entscheidungen des Reichsgerichts in Zivilsachen*, 103, p. 231).

[9] As to the Philippines, see Supreme Court of the Philippine Republic in *Haw Pia* v. *China Banking Corporation*, *The Lawyer's Journal* (Manila), vol. xiii (1948), p. 173 (a majority decision

The third method, i.e. the use of the occupant's own currency, is a universal and necessary practice, at any rate in the early stages of an occupation, and must be treated as lawful. During the Second World War the Americans used the 'yellow seal' dollar,[1] the German Army was provided with 'Reichskreditkassenscheine' denominated in Reichsmarks,[2] but in Jersey regular German Reichsmark notes seem to have been introduced.[3] In all these cases the occupant's currency was made legal tender in the occupied territory.

From the question of the legality of the currency system adopted by the occupant for the occupied territory it is necessary to distinguish clearly the problem of responsibility. Where the occupant introduces his own currency, it would seem clear that he is responsible for it, though in Jersey the Treasury authorized the exchange of Reichsmarks for sterling at the rate current at the time of the liberation, viz. 9·36 Reichsmarks to the pound;[3] it is for this reason that an occupant will normally discontinue using his own currency as soon as possible.[4] Where, however, the occupant introduces military notes, he does not engage his own credit but that of the occupied country in which he exercises supreme power. This is the view taken by the Allies in regard to the military currency issued by them in the course of the Second World War,[5] but it is remarkable that the Japanese war-notes issued as legal tender at par with the peso in the Philippines were guaranteed by the Japanese Government 'which takes full responsibility for their usage having the correct amount to back them up'.[6] From a practical point of view, of course, the problem is of very limited significance, because the victorious belligerent will usually obtain an indemnity from, and impose the duty of redemption upon, the defeated enemy, as the Allies did in the Armistice with Italy[7] and in the Treaties of Peace concluded with Italy, Roumania, and Hungary in 1947.[8] The fact, therefore,

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of seven to three), where Japanese military pesos were held to have been lawfully issued. As to Burma, it appears from Maung, in *Journal of Comparative Legislation*, 3rd series, 30 (1948), pp. 11, 13 ff., that the courts denied the right of the Japanese to issue military rupees or dollars; unfortunately the grounds of these decisions do not appear from Maung's article.

[1] Southard, op. cit.

[2] Lemkin, op. cit., p. 51.

[3] See Duret Aubin in *Journal of Comparative Legislation*, 3rd series, 31 (1949), p. 8, at p. 10.

[4] Southard, op. cit., p. 23.

[5] Ibid., pp. 49 ff., with interesting material. According to the same author (pp. 29 ff., 55, 56), the Italian Government demanded complete reimbursement in a Memorandum of 9 January 1945, which, unfortunately, has not been published, as a matter of right in appropriate foreign currency for all lire spent by Allied forces. The American decision of 10 October 1944 to reimburse Italy in dollars equivalent to the lire personally expended in Italy by American troops ('net troop pay') was obviously due to reasons other than legal ones (see Southard, op. cit., p. 30).

[6] See the decrees mentioned in the decision referred to on p. 274, n. 9.

[7] Clause 23; for the text see Holborn, op. cit., p. 123.

[8] Art. 76 (4) of the Treaty with Italy; Art. 30 (4) of the Treaty with Roumania; Art. 32 (4) of the Treaty with Hungary.

that after the First World War similar arrangements were made with Germany in regard to her monetary policy in Belgium and Roumania does not justify the principle postulated by Baron Nolde that 'la liquidation des mesures relatives au papier-monnaie qui peuvent être introduites par l'État occupant, appartient en droit à ce dernier'.[1]

Finally, whichever type of monetary organization is adopted by the occupant and whichever answer is given to the problem of responsibility, there arises the distinct question of defining the occupant's duties in regard to the operation and management of the occupied territory's monetary system. To lawyers it is of a peculiarly elusive character, because it depends upon matters of valuation and quantum about which only economists can speak with authority. Recent experience, however, permits the formulation of a few rules of conduct that would not seem to be open to any serious doubt. Thus it can be stated with confidence that the occupant who introduces a new or his own currency, may do so only to such extent as is required to satisfy military needs or to supplement an inadequate amount of circulating local currency.[2] Moreover, where the occupant establishes a rate of conversion as between the military and local currency, he must carry out a process of valuation which requires, but is not always accompanied by, a high degree of disinterestedness. It has been said that by overvaluing the Reichsmark and undervaluing the currencies of the occupied territories,[3] the Germans obtained unjustifiable economic advantages; on the other hand, the Allies seem to have overvalued both the lira and the Reichsmark[4] and, accordingly, to have undervalued their own currencies. Lastly, the occupant commits a breach of duty if he allows an extraordinary increase of the quantity of circulating money, if he promotes, or at least does not stop, inflation and depreciation of the value of money. Provided that he does not wish to impose responsibility for circumstances beyond the occupying Power's control, Professor Hyde is right, therefore, in suggesting 'a general rule of International Law forbidding the occupant to make it possible for the debtor to rob his creditors by the satisfaction of a debt through a greatly depreciated and practically worthless currency'.[5] In the last resort all these matters depend on facts, on economic conditions which a lawyer cannot judge without evidence bearing on each case. His general conclusion must be that no rule of strict law governing all eventualities can be stated. He must fall back upon the idea pervading the law of belligerent occupation according to which the occupant, while allowed to make war support war, may not exceed the functions of an 'administrator and usufructuary'[1] who within the limits of military needs acts for the public benefit of the inhabitants.[2]

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[1] *Recueil des Cours de l'Académie de Droit International*, 27 (1929), p. 311. In common with others, he seems to confuse the question of cover with that of the responsibility for redemption.

[2] This point appears clearly from Southard, op. cit., particularly p. 15.

[3] Lemkin, op. cit., p. 52.

[4] Kemmerer, op. cit., p. 89. The text deals with the early stages of the occupation of Germany when the Hague Regulations undoubtedly applied.

[5] 'Concerning the *Haw Pia* case', in *Philippine Law Journal*, 24 (1949), pp. 141, 144. See also Fraleigh in *Cornell Law Quarterly*, 35 (1949), pp. 89, 107 ff.

By way of postscript to the preceding discussion a few words should be added to emphasize that, even if by his monetary policy the belligerent occupant commits an international wrong and, therefore, makes himself liable to the occupied state, this has no effect whatever in private law. Notes issued and made legal tender by the occupant are money, because they are imposed by that power which *de facto*, though temporarily, exercises supreme authority.[3] Loans made in military currency are loans, they do not constitute a barter transaction.[4] A sum of money expressed and payable in the currency of the occupied region may be discharged by the payment of so many military currency notes as, under the material legal tender legislation, have the nominal value of the debt.[5] It is a question of private law to what extent judicial revalorization of debts repaid in greatly depreciated military currency is possible. In extreme cases the legislator will no doubt intervene, and since the end of the Second World War he has done so in Burma,[6] the Netherlands East Indies, Hong Kong, and Singapore.[7] But the liberated state's failure to effect legislative or judicial revalorization will not amount to an international wrong, unless it involves an abuse of rights in the sense discussed above.[8] There is, in particular, no evidence supporting Professor Hyde's charge that, when in the *Haw Pia* case[9] the Supreme Court of the Philippines recognized the Japanese military currency as legal tender and as capable of discharging a peso debt according to the nominal value, this constituted 'internationally illegal conduct upon the part of the Philippine Government which is productive of a solid claim for compensation in behalf of alien nationals or creditors who suffered loss as a direct consequence of such decision'.[10]

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[1] See the language of Art. 55 of the Hague Regulations.

[2] Oppenheim, *International Law*, vol. ii (6th ed., revised by Lauterpacht, 1944), p. 339.

[3] Mann, *The Legal Aspect of Money* (1938), pp. 10 ff., with further material.

[4] *Contra* the decisions of the courts of Burma mentioned by Maung (see p. 274, n. 9). They show clearly the inconvenience and the arbitrary character of the results flowing from a confusion of the aspects of military currency in private and public international law.

[5] See the decision of the Supreme Court of the Philippines, referred to on p. 274, n. 9.

[6] Maung, op. cit., at p. 15.

[7] Hyde, op. cit., p. 155; Miss Satz, in *Journal of Comparative Legislation*, 31 (1949), p. 3, reports about Danish law that, although the value of the Danish currency depreciated on account of the abundance of money arising from the German demands for the printing of paper currency, payment of a debt or the redemption of a mortgage during the occupation is valid.

[8] See p. 262.

[9] See above, p. 274, n. 9.

[10] See above, p. 276, n. 5. In so far as the Supreme Court held that the debtor could validly pay to the liquidator of the defendant bank whom the Japanese had appointed and that this did not involve confiscation, different considerations apply. This aspect of the decision is outside the ambit of the present article.

3. A problem of some gravity arises out of the exchange control legislation which the majority of states have enacted in the course of the last two decades: is a state under a duty to recognize and perhaps enforce the exchange control laws of other states?

A few years ago it would have been impossible even to pose this question. There would have been much greater justification in asking whether exchange control legislation, or at least numerous of its incidents, were not an international wrong rather than a right worthy of protection. Diplomatic practice, it is true, never countenanced an affirmative answer. It was in harmony with the generally prevailing impression when in 1932 the United States State Department adopted the attitude that 'such legislation does not ordinarily afford grounds for protest by foreign Governments in the absence of discrimination against their respective nationals'.[1] But it seemed that there might develop so substantial a body of judicial practice condemning exchange control legislation as inconsistent with public policy that an internationally recognizable rule might come into being. The courts of Switzerland and France denounced the inequities of foreign, particularly German, exchange control legislation; certain New York courts were no less outspoken.[2] Although other countries, among them England, preserved greater moderation and adhered to sound and discriminating principle,[3] it was possible for Professor Nussbaum to declare that 'apart from very special situations the various jurisdictions have been practically unanimous in refusing to apply foreign exchange control enactments'.[4] It must be remembered that the outcry against them was mainly caused by the German practice which fell to be considered by most of the courts concerned with the problem and which was in many respects such as to shock the conscience of the world. Yet a more judicious approach would have been indicated. The German practice, properly analysed, could have been treated on the distinct footing that the development of some of its aspects under Nazi rule constituted war-like acts.[5] It ought not to have been allowed to lead to unwarranted generalizations and exaggerations.

To-day the pendulum is swinging back, though by no means so far as to permit generalizations in the opposite sense. It is still possible that there are consequences of foreign exchange control which are inconsistent with

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[1] Hackworth, *Digest of International Law*, vol. ii (1941), p. 68.

[2] For references see Mann, *The Legal Aspect of Money* (1938), pp. 259 ff.; Nussbaum, *Money in the Law* (1939), pp. 487 ff.; Wolff, *Private International Law* (1945), pp. 456 ff. (as to whose remarks on the New York 'ticket cases' see *Modern Law Review*, 8 (1945), pp. 177, 189); Neumann, *Devisennotrecht und Internationales Privatrecht* (1938).

[3] Dicey, *Conflict of Laws* (6th ed. by Morris, 1949), pp. 750 ff.

[4] Op. cit., p. 487.

[5] See Rashba, 'Foreign Exchange Restrictions and Public Policy in the Conflict of Laws', in *Michigan Law Review*, 41 (1943), p. 777, particularly p. 814. The suggestion by Mann, op. cit., p. 263, that there must be very exceptional circumstances, approaching a state of war, to justify an English court in invoking public policy, seemed to be the strongest permissible in 1938.

English public order,[1] and the fact that most countries have resorted to exchange control neither requires its recognition *in toto* nor precludes its rejection *in partibus*. Now, as before, established principles of private international law and prudent distinctions are the only safe guide for the lawyer. The limits of what is at present permissible by way of affirmative approach to foreign exchange regulations are probably reached by the suggestion that 'a contractual obligation may be invalidated or discharged by exchange control legislation, if . . . its enforcement is required by British interests of state, especially if it was enacted in a foreign country by virtue or in fulfilment of an obligation imposed by a treaty to which the United Kingdom is a party'.[2] It is only where treaties (or even informal arrangements such as apply to the sterling area) have expressly or by inference imposed the international duty of protection that municipal courts are entitled, and bound, to give effect to what seems to be a new, and may rapidly become a growing, trend.

A duty of this type arises from Article VIII (2) (*b*) of the Bretton Woods Agreement, incorporated into the law of England by s. 3 of the Bretton Woods Agreement Order, 1946:

> 'Exchange contracts which involve the currency of any member and which are contrary to the Exchange Control Regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.'

The problems of construction inherent in this sentence are manifold.[3] While it is clear that to some extent the provision substitutes the control of the *lex monetae* for that of the *lex causae*, i.e. the proper law of the contract, its delimitation is difficult, because the term 'exchange contracts' is unusual. This probably refers to contracts which in any way affect a country's exchange resources; the term would seem to include, therefore, not only contracts for the exchange of one currency (e.g. francs) against another currency (e.g. sterling), but also contracts creating a debt in favour of a non-resident or providing for the transfer of securities from a resident to a non-resident, and so forth. On the other hand, the term 'contract' will have to be construed more strictly; although it comprises a contract in the narrow sense of the word as well as a conveyance, a settlement, or a declaration of trust, it cannot possibly be said to be applicable to claims arising *ex delicto* or to claims by the owner of a chattel against the possessor.[4]

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[1] Particularly where they affect current transactions privileged by the International Monetary Fund Agreement (see above, p. 269).

[2] Dicey, op. cit. It is difficult to see how in the absence of treaty obligations British interests of state can *require* the enforcement of foreign exchange control. Perhaps the last part of the sentence ought to refer to enactments passed 'in accordance with the terms of a treaty' rather than to an obligation imposed by a treaty. Cf., however, the decision of the Court of Appeal of Amsterdam of 15 January 1947 (*International Law Quarterly*, 3 (1950), p. 102).

[3] See Mann in *Modern Law Review*, 10 (1947), p. 411, at p. 418; and Nussbaum in *Yale Law Journal*, 59 (1950), p. 421.

[4] It is for this reason that Art. VIII (2) (*b*) was immaterial to the cases of *Kahler* v. *Midland Bank Ltd.*, [1950] A.C. 24 and *Frankman* v. *Zivnostenska Banka*, [1950] A.C. 57.

A similar duty may flow from treaties even in those cases in which they have not been incorporated into the law of England. As has been pointed out,[1] the Bretton Woods Agreement does not express or imply a duty to establish restrictions of capital transfers, but merely grants the power to do so, and in its exercise the United Kingdom has undertaken in a number of Agreements to prevent unauthorized capital transfers. Where such an obligation exists, is it not for an English court a matter of public policy to ensure its implementation, even though the treaty does not form part of English law? It is submitted that the answer should be in the affirmative[2] and that it is this ground which should lead in many cases to the dismissal of actions of the type exemplified by *Kahler* v. *Midland Bank Ltd.*[3] and *Frankman* v. *Zivnostenska Banka.*[4] The facts of the former case may be taken as representative and summarized as follows. The plaintiff was the owner of certain Canadian securities which were deposited with Midland Bank Ltd. in London for the account of a bank in Czechoslovakia which in turn held them for the plaintiff. His action *in detinue* against Midland Bank Ltd. was dismissed by Lords Simonds, Norman, and Radcliffe, Lords MacDermott and Reid dissenting. The majority held that the plaintiff had to prove his right to immediate possession, that this depended on his contract with the Czechoslovakian bank, that this was subject to the law of Czechoslovakia which precluded a release to the plaintiff without the permission of the National Bank which had been refused. Both the reasoning put forward and the result reached by the majority would perhaps have been more convincing and satisfying had the House referred to Article 5 of the Monetary Agreement with Czechoslovakia[5] and dismissed the action on the ground that it was the duty of an English court to refuse to give effect to a claim the recognition of which would amount to a breach of the British Government's treaty obligations. Moreover, on this basis the House of Lords would have had less difficulty in rejecting the plaintiff's argument that the material legislation of Czechoslovakia was of a confiscatory character and therefore incapable of being recognized in England. In *Kahler*'s case Lord Simonds and Lord Reid stated,[6] without giving any reason, that the Czechoslovakian law was not confiscatory. In *Frankman*'s case Lord Simonds said[7] that, while foreign currency legislation might be confiscatory, it 'should be applied in the case of a law which does not appear to differ in material respects from the legislation contemplated by the Bretton Woods Agreement which is now part of the law of this country'.[1] The reason why confiscatory legislation is not enforced here is either that a state's legislative jurisdiction is territorially limited so as to be unable to affect property situate abroad, or that the principles of private international law deny any effect upon property to a legal system other than the *lex rei sitae*. Neither reason is eliminated by the fact, referred to by Lord Simonds, that the *lex fori* includes legislation of a type similar to that of the foreign country which, *ex hypothesi*, is confiscatory. Both reasons would cease to have validity if the enforcement of this country's treaty obligations were accepted as a head of public policy.

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[1] See above, p. 269.

[2] The problem is, of course, a general one and requires further investigation.

[3] [1950] A.C. 24.

[4] [1950] A.C. 57.

[5] See above, p. 267, n. 5 and p. 269, n. 3.

[6] *Ubi supra*, pp. 27 and 46, 47.

[7] *Ubi supra*, p. 72.

III

When one comes to monetary obligations arising under public international law, one enters a field which not only is largely unexplored, but also yields such extensive and rich material that it is impossible to chart it in all its details or with completeness. The type of problems to be considered is, it is true, almost identical with those which are so well known to the municipal legal systems of all countries, and the primary task, therefore, is to ascertain the extent to which the solutions evolved by municipal law are acceptable to international law. But two complications must be borne in mind. In the first place, international practice, which must form the background of legal research, has developed over a long period of time, discloses many varieties, and is dispersed over numerous treaties; it is so elusive that caution is required before a rule of customary international law can be deduced from it. Secondly, the international legal order lacks an international currency of its own. It is, consequently, compelled to avail itself of national currencies as its instruments; the resulting interplay of international and municipal law creates problems which, in this connexion, as in so many others, involve peculiar difficulties.

Their impact is eliminated or at least substantially reduced where international law resorts to the device of adopting a unit of account which is independently defined and which actually is, or may soon become, an imaginary one. Thus in recent times multilateral treaties have been concluded on the basis of the gold franc of 100 centimes weighing 10/31 of a gramme and of a fineness of 0·900[2] or of the gold franc containing

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[1] In view of the letter and spirit of the Bretton Woods Agreement as set out above, pp. 268 ff., it is not certain whether the word 'contemplated' is not perhaps a little misleading.

[2] Universal Postal Convention of 28 June 1929, Art. 28 (Hudson, *International Legislation*, vol. iv, No. 222); Telecommunication Convention of 9 December 1932, Art. 32 (ibid., vol. vi, No. 316), adopted by the Agreement of 23 September 1944 between the United Kingdom and the U.S.S.R. for the Establishment of a direct Radiotelephone Service between their respective countries (Cmd. 7028); African Telecommunications Union Agreement of 30 October 1935, Art. 28 (ibid., vol. vii, No. 431); Convention on the Transport of Goods by Rail, 23 November 1933, Art. 56 (ibid., vol. vi, No. 353); Convention on the Transport of Passengers and Luggage by Rail, 23 November 1933, Art. 56 (ibid., No. 354). The predecessors of the last two Conventions referred to the gold franc 'reckoned at 1/5·18 dollars of the United States of America' (23 October 1924, Art. 65 (ibid., vol. ii, No. 129)).

65½ milligrams of gold of a fineness of 900/1,000.[1] In these and similar[2] cases the definition is identical with that of a national unit of account as constituted at the material time, i.e. the French franc, yet by incorporating the full definition in their text these treaties have achieved more than they could have done by a mere reference to the national unit of account or the adoption of a mere gold clause: they have created their own monetary system which cannot be affected by municipal legislation.

Such cases, however, are still rare. Usually international practice works with national currencies.

1. Contracts made according to private law frequently fail to clarify the money of account with reference to which the parties are contracting: are dollars mentioned in the agreement United States or Canadian dollars? When entering into treaties states will usually take care of questions of this kind, but where an express definition of the money account is omitted, the real intention of the parties will be apparent from the construction of the terms of the treaty or from the circumstances attending its conclusion. Thus the Convention concerning the Régime of the Straits of 20 July 1936 speaks of 'francs gold'.[3] Although it was entered into at Montreux, the fact that Switzerland did not, but France did, participate in it readily leads to the conclusion that the parties contemplated French francs. The Agreement for the Creation of an International Office for dealing with Contagious Diseases of Animals, signed in Paris on 25 January 1924,[4] provides in Article 11 of the Organic Statutes for an annual contribution of the members expressed in units which are calculated 'on the basis of 500 francs per unit'. Since the seat was to be in Paris, French francs are no doubt referred to. The Agreement concerning the creation of an International Association for the Protection of Children, signed in Brussels on 2 August 1922,[5] provides for an annual contribution of '3000 Frs.' or more payable

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[1] Convention for the Unification of certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface, 23 May 1933, Art. 19 (Hudson, op. cit., vol. vi, No. 329); Convention for the Unification of Certain Rules regarding Air Transport, 12 October 1929, Art. 22 (ibid., vol. v, p. 100), incorporated into the law of England by the Carriage by Air Act, 1932. On methods of calculating the present value of this 'gold franc' see the statement of the French Minister of Finance and Economic Affairs, printed in *Revue Critique*, 1949, p. 730.

[2] The Statutes of the Bank for International Settlements provide that the authorized capital of the Bank shall be 500 m. Swiss gold francs equivalent to 145,161,280·32 grammes fine gold (Art. 5, Cmd. 3766). The case is strictly speaking not on the same level as that discussed in the text, because reference is made to the *Swiss* franc. The Memorandum respecting the International Convention on Financial Assistance, signed at Geneva on 2 October 1930 (but never put into force), provided in Art. 26 that for the purposes of the Convention 'the gold franc shall mean a monetary value equivalent to 0·322581 gramme or 4·97818 grains of gold nine-tenths fine' (Cmd. 3906). No truly 'international standard' was established by the Statutes of the International Hydrographic Bureau of 21 June 1921 (Hudson, op. cit., vol. i, p. 663), Art. 33, according to which the receipts of the Bureau and the salaries of the Director and Secretary General were to be 'calculated on the basis of an international standard which is the gold franc'.

[3] Annex I. See Hudson, *International Legislation*, vol. vii, No. 449, at p. 401.

[4] Ibid., vol. ii, p. 1239; Cmd. 2663.

[5] Hudson, op. cit., vol. ii, p. 876.

by members (Art. 4). The seat of the Association was to be in Brussels (Art. 1) and Belgian francs were probably meant by the parties. In case of doubt the solution must always be found in the circumstances. The suggestion that prima facie debts arising under public international law are expressed in the currency of the creditor state[1] is without foundation.

On the other hand, the problem of determining the money of account in which unliquidated damages are expressed is very familiar to international practice.[2] In some cases the Convention creating an international tribunal has specified the currency to be employed for the assessment of damages.[3] In the absence of express directions tribunals have searched for other indications in the Conventions. In the Mexican arbitrations they have frequently found them in the provision according to which any *balance* due from the one to the other government after the disposal of all claims shall be paid 'in gold coin or its equivalent to the Government of the country in favour of whose citizens the greater amount may have been awarded'.[4] In view of this provision the United States–Mexico General Claims Commission adopted the practice of rendering awards in United States currency,[5]

'having in mind the purpose of avoiding future uncertainties with respect to rates of exchange which, it appears, the two Governments also had in mind in framing the

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[1] Neumeyer, *Internationales Verwaltungsrecht*, vol. iii, Part 2 (1930), pp. 121 ff., 124.

[2] See Nussbaum, *Money in the Law* (1939), p. 468.

[3] See the Treaty between the United States of America and Colombia of 17 August 1874 relating to an indemnity in respect of the steamer *Montigo* (Moore, *International Arbitrations* (1898), vol. v, p. 4698): 'and if indemnity be given, the same shall be expressed in the legal coin of the United States of Colombia' (Art. 4); Treaty between the United States of America and Venezuela of 19 January 1892 (ibid., p. 4818): damages 'shall be expressed in American gold' (Art. V); Treaty between the United States of America and Ecuador of 28 February 1893 for arbitration in respect of Santos' claim (ibid., p. 4713): damages 'shall be specified in the gold coin of the United States of America' (Art. V); Treaty between the United States of America and Venezuela for the establishment of a Mixed Claims Commission, Protocol of 17 February 1903 (Ralston, *Venezuelan Arbitrations of 1903* (1904), at p. 1): 'all awards shall be made payable in United States gold or its equivalent in silver' (Art. I); Agreement for Arbitration between the United States of America and Venezuela of 13 February 1909 relating to the Orinoco Steamship Company (Scott, *The Hague Court Reports* (1916), pp. 239 ff.): 'all awards shall be made in gold coin of the United States of America or its equivalent in Venezuelan money'; Agreement between the United States of America and Mexico of 22 May 1902 relating to the *Pious Fund* case (ibid., pp. 7 ff.): 'The findings shall state the amount and the currency in which the same shall be payable' (Art. 10); Agreement between the United States of America and Peru of 21 May 1921 (*Reports of International Arbitral Awards* (United Nations), vol. i, p. 347): 'The amount granted by the Award . . . shall be made payable in gold coin of the United States' (Art. XII).

[4] United States of America and Mexico General Claims Commission, Convention of 8 September 1923 (Art. IX); United States of America and Mexico, Special Claims Commission, Convention of 10 September 1923 (Art. IX); France and Mexico Claims Commission, Convention of 25 September 1924 (Art. IX); Germany and Mexico Claims Commission, Convention of 16 March 1923 (Art. X); Spain and Mexico Claims Commission, Convention of 25 November 1925 (Art. 9); Great Britain and Mexico Claims Commission, Convention of 19 November 1926 (Art. 9); Italy and Mexico Claims Commission, Convention of 13 January 1927 (Art. 9).

[5] Feller, *The Mexican Claims Commissions 1923–1934* (1935), p. 313; De Beus, *The Jurisprudence of the General Claims Commission United States and Mexico* (1938), p. 272.

> first paragraph of Art. IX of the Convention of September 8, 1923 with respect to the payment of the balance therein mentioned in gold coin or its equivalent.'

This somewhat arbitrary method had the grave disadvantage of involving an exchange operation and thus giving rise to many difficulties[1] which also came to light in other connexions and which public international law has not yet overcome.[2] That method, however, was not followed by the British-Mexican, French-Mexican, German-Mexican, and Spanish-Mexican Claims Commissions,[3] all of which awarded damages in gold pesos.

Where the tribunal cannot find any guidance in the Convention from which it derives its existence, no definite rule of law emerges until[4] the finding by the Permanent Court of International Justice in *The Wimbledon* case that the damages which Germany was ordered to pay to France for her refusal to allow a French ship to pass through the Kiel Canal should be paid in French francs:[5]

> 'This is the currency of the applicant in which his financial operations and accounts are conducted and it may therefore be said that this currency gives the exact measure of the loss to be made good.'

This would seem to be a sound principle, for which some authority can be found in private law. It will not, however, be appropriate to all cases and cannot, therefore, be said to be of general validity.

2. Treaties providing for the payment of a sum of money have become a matter of almost daily occurrence. Yet international law has so far disregarded the fundamental problem of the law of money, viz. the principle of nominalism, its extent, and its force in inter-state relationships. Is it a rule of international law that a gold clause must be read into all treaty obligations of a monetary character or, in other words, that the debtor state must pay so much 'value' as was agreed at the date when the treaty was made? Or is the debtor state bound and entitled to pay the nominal amount of the agreed currency, irrespective of the 'intrinsic value' in terms of gold, purchasing power, or another currency at the date of payment? And is any extrinsic alteration of the currency binding for the purposes of an obliga-

[1] De Beus, op. cit., p. 273; see also Ralston, *The Law and Procedure of International Tribunals, Supplement* (1936), p. 183.

[2] See, for example, *United States of America on behalf of Socony-Vacuum Oil Co. Inc.* v. *The Republic of Turkey*, in Nielsen, *American-Turkish Claims Settlement* (1932), pp. 369 ff. The case related to the assessment of the value of property requisitioned without compensation in Turkey. The Tribunal said: 'The claimant in the present case and other claimants have as a general rule converted Turkish money into American money at rates understood to prevail at the time of the taking of the property.' This practice was approved. The discussion is elaborate, but a little confused.

[3] Feller, op. cit., p. 314; Great Britain and Mexico Claims Commission, Award of 19 May 1931, *In re Watson* (*Annual Digest*, 1931–2, Case No. 113).

[4] It must be admitted, however, that the practice is still by no means uniform. For example, it is difficult to understand why pounds sterling were awarded in *Madame Chevreau*'s case (*American Journal of International Law*, 27 (1933), p. 153).

[5] *Publications of the Court*, Series A, No. 1, p. 32.

tion subject to international law? By a treaty of 26 June 1803[1] the Duke of Mecklenburg-Schwerin was granted by the King of Sweden the usufruct of Wismar for a period of 100 years against payment of 'une somme totale de 1.250.000 écus (Reichsthaler) de Banque de Hambourg' (Art. VI); it was further agreed that, if at the end of the term the King of Sweden should retake possession, 'alors Sa dite Majesté s'engage de la manière la plus positive . . . de restituer à Son Altesse Sérénissime la somme hypothécaire primitive' (Art. IV). If the treaty of 20 June 1903[2] had not rescinded the King of Sweden's right to the beneficial possession of Wismar and, accordingly, his obligation to repay the agreed sum of Reichsthaler Hamburg Banco, the question would have arisen of how this was to be paid in 1903. Would the amount of Reichsthaler, in accordance with German legislation of 1871, have been converted into 416,600 marks (which have since become Reichsmarks and then, perhaps, Deutsche Marks)? And would the clause 'Hamburg Banco'[3] have been disregarded?

It is submitted that by contracting on the footing of a specific national currency states incorporate into their treaties the monetary legislation of the country concerned, that to that extent their treaties contain a *renvoi* to the *lex monetae*. The problem is one of construction: when states resort to the use of an institution which is created by, and cannot be defined otherwise than by reference to, a municipal system of law, they adopt *pro tanto* that legislation. In a contract which is subject to English law and which stipulates for the payment of a sum of foreign money, the law regulating that money 'becomes for this purpose a part of the "proper law" of the contract'.[4] It is for this reason that the definition of what the stipulated unit of account means is referred to the *lex monetae* by a universally followed rule of the conflict of laws. It is for the same reason that monetary obligations under public international law are subject to the *lex monetae* in so far as the definition of the unit of account is concerned.

On this basis, however, the further question arises whether the reference to the *lex monetae* envisages the particular law of the currency as it exists at the time of the conclusion of the treaty, or, generally, such law of the currency as may develop from time to time. In private law nominalism has the latter meaning. The ratio underlying this rule also applies to inter-state obligations. Where parties refrain from introducing a gold clause or a similar protective measure, the intention, if any, to secure a particular 'value' remains unexpressed and is, therefore, legally irrelevant.

In connexion with inter-state obligations it is necessary to ask whether nominalism as usually understood controls even in those cases in which a state relies on its own monetary legislation to the prejudice of the promisee state. A negative answer must clearly be predicated where the municipal monetary legislation constitutes a breach of international obligations. Thus a devaluation of a debtor state's currency in defiance of the duties imposed upon the debtor by the Articles of Agreement of the International Monetary Fund would have to be disregarded for the purpose of ascertaining the amount payable under a treaty concluded before the devaluation. But it may be argued that, even in the absence of specific treaty obligations, the promisor state's monetary legislation must be ignored by public international law on account of its inconsistency with the overriding principle of *pacta sunt servanda*; that a waiver of the right to rely on municipal legislation must accordingly be read into the treaty; that, just as the state cannot by its own legislation reduce its indebtedness created under public international law, it cannot circuitously do so by paying 'the whole of [the debt's] nominal amount possessing only one-half of its real value';[1] that

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[1] Martens, *Recueil de traités*, 8 (1835), p. 54.

[2] *Nouveau Recueil général*, 2nd series, 31, pp. 572, 574.

[3] On this see Nussbaum, op. cit., pp. 311, 312.

[4] *Re Chesterman's Trusts*, [1923] 2 Ch. 466, 483, *per* Warrington L.J.

> 'instead of there being in the undertaking of a State . . . to pay a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'[2]

Although this line of reasoning will perhaps appeal to some, it cannot be accepted as sound. The quality and extent of the protection which public international law affords to a treaty are impaired if and in so far as the treaty incorporates or refers to municipal law. Monetary obligations, in particular, are, and are generally known to be, 'subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is therefore assumed with reference to that power'.[3] Consequently, when states contract on the basis of the promisor's money of account and fail to secure the promisee state by special clauses, no material exists which could lead to reading into the treaty a waiver rather than a reservation of the right of alteration.

3. Whether, in the event of a catastrophic depreciation of a currency, international law would decree the revalorization of inter-state debts, is an open problem. No material is available which would indicate a tendency in a particular direction. As a matter of principle it would not seem to be impossible to develop an international rule of revalorization. The paramount maxim of good faith that pervades the interpretation of treaties may provide the tools. The French doctrine of *imprévision* and the revalorization and price revision practice developed in numerous continental countries

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[1] See above, p. 260, n. 2.

[2] *Murray* v. *Charleston* (1877), 96 U.S. 432, 445, *per* Mr. Justice Strong; *Hartman* v. *Greenhaw* (1880), 102 U.S. 678; cf. *Perry* v. *United States* (1935), 294 U.S. 330.

[3] *Knox* v. *Lee* and *Parker* v. *Davies* (1870), 79 U.S. 457, 548, *per* Mr. Justice Strong.

after the First World War[1] may be regarded as examples to which an international tribunal could turn. The fact that the Anglo-American countries, among others, reject the idea of revalorization does not mean that an international tribunal should refrain from affording relief even in an extreme case.[2]

As a result of the devaluation of sterling by no less than 30 per cent. on 18 September 1949 the problem has acquired considerable practical significance. The issue was at once raised by Argentina in a Note[3] addressed to the British Government and requiring a revision of the sterling prices fixed by the Agreement on Trade and Payments of 27 June 1949.[4] This is of a synallagmatic character well known to private law: the parties agreed to sell, and to facilitate the sale of, goods 'to the value necessary to maintain in approximate balance and at the highest level possible transactions in pounds sterling'.[5] The Schedules envisage British purchases to the extent of £129m. and Argentine purchases to the extent of about £121·5m. It would seem that the British devaluation seriously upset the equilibrium intended by the parties. The dispute will doubtless be settled,[6] but on a broad analogy of the practice developed by the courts of continental countries and as a matter of first impression it is arguable that the general principles of international law support Argentina's right to relief in respect of the agreed basic price of £97·536 per long ton of meat. The manner and extent of relief would depend on a thorough examination of all the circumstances of the case, about which the published material does not provide sufficient information. In view of the fact that the Agreement itself established machinery for annual review[7] by a Mixed Commission,[8] the highly exceptional remedy of rescission probably was not available. It is arguable that the possibility of annual review precluded also a revision of the agreed sterling price during the course of a year,[1] but in the absence of all relevant evidence it is impossible to suggest a solution of, or even to do more than indicate, this point as well as numerous others arising out of an incident which, from a purely legal point of view, is of fascinating interest.

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[1] See Mann, *The Legal Aspect of Money* (1938), pp. 74 ff., 207 ff.; Nussbaum, *Money in the Law* (1939), pp. 269–96; on Swiss law see the illuminating article by Deschenaux, 'La Révision des contrats en droit suisse', in *Journal of Comparative Legislation*, 3rd series, 30 (1948), p. 55.

[2] Cf. *Desplanque* v. *Administrative Board of the Staff Pensions Fund of the League of Nations*, decided by the Administrative Tribunal of the League of Nations on 6 May 1938, *Annual Digest*, 1941–2, Case No. 132: the devaluation of the Swiss franc does not entitle a pensioner of the League of Nations to a revalorization of his pension. In certain cases relief may be given by allowing rescission of agreements. This remedy does not require separate discussion.

[3] *The Observer* newspaper, 25 September 1949, p. 3; *The Times* newspaper, 26 September 1949, p. 4 and (on the British reply) 1 October 1949.

[4] Cmd. 7735. The Agreement provides (Art. 13) that the parties shall negotiate in London a contract for the supply of meat conforming to the provisions of the Agreement (Annex A). This contract has not been published and it is not known whether it is subject to public international law. In the text it is assumed that the published treaty is decisive for the decision of the dispute. It is highly regrettable that the numerous 'bulk purchasing contracts' concluded by the United Kingdom are shrouded in a cloud of secrecy. Not a single text seems to have been published.

[5] Arts. 5 (*a*) and 14 (*a*).

[6] By the end of 1949 nothing had been published about the outcome of the negotiations.

[7] Arts. 9, 10 (*b*), 18.

[8] Art. 4.

Where depreciation occurs after the date of maturity of an international debt, it would seem that international law is inclined to accept the rule, known to most legal systems on the Continent but rejected by English law, according to which the debtor must make good the damage flowing from his *mora*. On 12 January 1863 the Claims Commission between the United States of America and Peru awarded one Montano, a citizen of Peru, the sum of $24,151·29 'payable in the current money of the United States'. When Montano in 1864 applied to the United States of America for payment, the sum due to him was worth only $15,000 in gold. The umpire of the commission to whom the matter was referred decided that payment should be made in gold.[2] In *Cerruti*'s case an award made by President Cleveland in 1897 had decided that the claimant, an Italian subject, was entitled to be indemnified in respect of the debts arising out of a business which he had carried on in Colombia, but which had been confiscated. One of the debts was expressed in Colombian money which greatly depreciated, but in 1903 the creditor in question recovered payment under a judgment obtained against the claimant in Italy for some 181,000 lire. The claimant was apparently granted full compensation, for another international tribunal held in 1911 that 'on doit . . . se remettre autant que possible dans l'état existant avant la confiscation des biens du sieur Cerruti survenue aux mois de janvier et février 1885'.[3] Perhaps it is also permissible to refer to the decision of the Privy Council in *Pilkington* v. *Commissioners for Claims on France*,[4] which may well be considered as an international case: in the course of the Napoleonic war the French Government confiscated money due to the English claimants; subsequently it provided a fund for compensation. The Privy Council stated that the wrong done by the French Government must be completely undone and that, if the wrongdoer 'has received the assignats at the value of 50*d*., he does not make compensation by returning an assignat which is only worth 20*d*.; he must make up the difference between the value of the assignats at the different dates'.[1]

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[1] Art. 17 (*b*) would have to be considered in this connexion. It provides that, if to maintain the balance of payments in sterling it should be necessary to make any adjustment (probably of the contracts in Schedule 3, i.e. the sales to Argentina), this would be effected by new purchases of Argentine goods and that any such adjustment would be negotiated by the Mixed Commission. For the purpose of weighing the legally relevant circumstances it would be necessary to know more about the statements made in the course of the negotiations. According to Sir Stafford Cripps, British representatives 'indicated' that they would discuss meat prices with Argentina if the sterling–peso rate of exchange was varied as a result of action taken by Great Britain (Hansard, *Parliamentary Debates*, *House of Commons*, 27 September 1949, col. 24). The currency policy adopted by Argentina after the British devaluation is, of course, also a material element. It is to be hoped that the whole material, in particular the diplomatic correspondence, will be published.

[2] Moore, *Digest of International Law* (1906), vol. vii, p. 51; *International Arbitrations* (1898), vol. ii, pp. 1638, 1645, 1649.

[3] *Revue générale de Droit international public*, 19 (1912), pp. 268, 273.

[4] (1821), 2 Knapp 7, 20.

4. In view of the situation described in the preceding paragraphs it is not surprising that states have frequently resorted to measures designed to protect them against the effect of currency depreciation. The earliest example of a protective clause that could be found is the foreign currency clause contained in the Treaty of 30 April 1803 by which the United States of America acquired Louisiana from France.[2] The purchaser agreed to pay 60m. francs by creating $11,250,000 6 per cent. Redeemable Stock. At the same time the parties agreed (Art. III)

> 'that the dollar of the United States specified in the present Convention shall be fixed at five francs $\frac{3333}{10{\cdot}000}$ or five livres eight sous tournois.'

The most modern and elaborate clause that seems to have found its way into a treaty is another foreign currency clause included in the Treaty of 3 March 1935 for the Sale of the Chinese Eastern Railway by the U.S.S.R. to Japan.[3] Japan undertook to pay a sum of 140 m. yen in Japanese currency (Art. I). By Article VIII the parties agreed that

> 'in case the exchange rate of the yen in terms of the Swiss franc should rise or fall by not less than 8 per cent., the amount of any instalment shall be increased or'

reduced as the case may be 'so that the value in Swiss francs of the instalment shall be the same as it is at the date of the coming into force of the present agreement'. The Treaty also contains detailed provisions dealing with any alteration of the gold parity of the Swiss franc and with the suspension of its convertibility into gold. Another carefully devised currency clause was that included in the Convention concluded on 29 November 1947 between France and Italy[4] whereby the latter country agreed to pay 1,500 m. lire in consideration of the release of all Italian property from the charge imposed by Article 79 of the Treaty of Peace of 1947. Such sum was subject to a dollar clause at a fixed rate so that the amount due was equal to $28,965,117 *monnaie de compte*. Payments to the debit of the lire account are measured on the basis of a dollar clause (Art. 6), the interpretation of which is not free from doubt.

The more usual method, however, is the stipulation of a gold clause.[5]

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[1] For other cases see Ralston, *The Law and Procedure of International Tribunals* (1926), p. 51 and *Supplement* (1936), p. 183.

[2] Malloy, *Treaties, Conventions, International Acts, Protocols, and Agreements between the U.S.A. and Other Powers (1776–1909)* (1910), vol. i, p. 511.

[3] *Nouveau Recueil général*, 3rd series, 30, p. 649.

[4] *Revue critique de Droit international privé*, 38 (1949), p. 148.

[5] Apart from the examples mentioned in the subsequent notes the following deserve a reference: Art. 262 (2) of the Treaty of Versailles: 'For the purpose of this Article the gold coins mentioned

Except in cases of multipartite treaties[1] Great Britain as creditor does not appear to have ever adopted that device, but the United States of America has almost invariably done so up to the time when, in 1933, by the Joint Resolution of Congress the gold clause was declared to be contrary to the public policy of American municipal law. Numerous other countries have inserted a gold clause into their treaties and, if the existence of nominalism in public international law still required proof, it would be supplied by the fact that states have thought it necessary to protect themselves against its effects by agreeing on a gold clause.

Even in private law it will now have to be regarded as the rule that, wherever the word 'gold' is used in connexion with a monetary obligation, a gold clause exists, and that the artificial and sterile distinction between gold coin and gold value clauses has become obsolete.[2] This is certainly the position in public international law: no debtor state will be allowed to say that, because it agreed to pay 'in gold coin', this is merely a descriptive *clause de style*, not a gold clause, or merely refers to the mode of payment and ceases to have effect when the circulation of gold coins is discontinued; but except in very special circumstances a gold clause cannot be implied in a treaty.

In other respects, too, the clause will have to be given a broad interpretation. A properly drawn gold clause requires a definition of the gold's weight and fineness. It is only rarely that states care to clarify this point.[3]

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above shall be defined as being of the weight and fineness as enacted by law on 1 January 1914'; Agreement between the United Kingdom, Canada, and the Soviet Union relating to the sale of the nickel mines in the district of Petsamo to the Soviet Union which was to pay United States dollars 'reckoned at the value of 35 dollars to one ounce of gold' (*The Times* newspaper, 20 October 1944, p. 3); according to the Paris Peace Treaties the reparations due to the Soviet Union and to some extent to Greece, Yugoslavia, and Czechoslovakia were expressed in United States dollars 'at its gold parity on 1 July 1946, i.e. $35 for one ounce of gold': Treaty of Peace with Italy, Art. 74 (A); with Roumania, Art. 22; with Bulgaria, Art. 21; with Hungary, Art. 23; with Finland, Art. 23. In Art. VI of the International Wheat Agreement of 6 March 1948 (Cmd. 7382) prices were agreed in dollars of 'Canadian currency at the parity for the Canadian dollar determined for the purposes of the International Monetary Fund as at March 1, 1949'. The Agreement between the U.S.S.R. and the Central People's Government of the Republic of China of 14 February 1950 (*The New York Times* newspaper, 15 February 1950, p. 11) provides for credits 'of 300 m. American dollars calculated on the basis of 35 American dollars to one ounce of fine gold' (Art. I).

[1] Art. 262 (1) of the Treaty of Versailles provided that all sums due from Germany and expressed in gold marks should be paid at the option of the creditors in pounds sterling, gold dollars, gold francs, or gold lire. The gold clause is contained in Germany's promise to pay gold marks as defined by Art. 262 (2); see the preceding note. Nothing was gained, therefore, by adding a gold clause to the moneys of payment, and the omission to use the word 'gold' in connexion with sterling is without significance. *Contra* Nussbaum, *Money in the Law* (1939), p. 305, who is wrong in saying that the English part of the Young loan did not contain a gold clause.

[2] Dicey, *Conflict of Laws* (6th ed. by Morris, 1949), p. 731.

[3] See p. 282, n. 2 and p. 283, n. 3; for other examples see: Convention for the Establishment of an International Central American Tribunal, concluded between Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica (Hudson, op. cit., vol. ii, No. 79): the minimum honorarium of each of the arbitrators shall be 1,000 American dollars gold per month (Art. 23); Regulations for the Execution of the Convention of the Postal Union of the Americas and Spain of 10 November 1931 (ibid., vol. v, No. 297*b*): the expenses of the International Office may not exceed the

Usually the conclusion that the parties were contemplating the conditions existing at the time when the treaty was made, is a matter of inference.

It is the prevailing tendency in private law to submit the question of the effect of the abrogation of the gold clause to the proper law of the contract rather than the law of the currency. If the classification accepted by public international law were similar, it would follow that the abrogation of the gold clause by national legislation could not in any event affect the debtor state's obligations under a treaty. If public international law regarded the gold clause as belonging to the law of the currency, its abrogation would have validity also within the ambit of treaties. Although the abrogation of the gold clause is a measure of monetary policy and although, it must be admitted, there is something artificial in the submission of a single clause to different systems of law,[1] it must probably be regarded as decisive that it is the very purpose of the gold clause to protect the parties against the effects of the *lex monetae* and that, therefore, the parties cannot have intended to submit it to that legal system. The parties to a treaty, in particular, cannot be presumed to extend their reference to municipal law, made by the adoption of a national currency, further than the terms of the treaty necessitate. Gold clauses and their abrogation must be subject to public international law. The question became practical, but was not decided, in connexion with Article 14 of the Convention for the construction of the Panama Canal of 18 November 1903[2] whereby the United States

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annual sum of 13,000 Uruguayan gold pesos; Convention between the United States and Denmark for the cession of the West Indies of 4 August 1916 (*American Journal of International Law*, 11 (1917), *Supplement*, p. 53*a*): payment of '25 m. dollars in gold coin of the United States'; Treaty between Austria and Turkey relating to Bosnia-Herzegovina of 26 February 1909 (*Nouveau Recueil général*, 3rd series, 2, p. 661): Austria was to pay for Turkish real property in the ceded territory '2½ millions de livres turques en or' (Art. V); Treaty of Versailles between Germany and France of 26 February 1871 (ibid., 19, p. 652): France undertook to pay 'cinq milliards de francs' (Art. 2) and by Art. 7 of the Treaty of Frankfurt of 10 May 1871 (ibid., p. 688) all payments were to be made 'en métal or ou argent, en billets de la banque d'Angleterre, de Prusse, des Pays Bas ou de la Belgique'; Treaty between the United States of America and Colombia of 6 April 1914 (ibid., 12, p. 131): for the rights in respect of the Panama Canal Zone the United States of America paid 'the sum of $250 m. gold United States money'; Baltic Geodetic Convention of 31 December 1925 (Hudson, op. cit., vol. iii, p. 1823): annual contributions fixed in 'gold dollars' (Art. 7); Agreement concerning the liquidation of German property in Switzerland of 25 May 1946 (Cmd. 6884): '250 m. Swiss francs payable on demand in gold in New York' (Clause II. 2); the Carriage of Goods by Sea Act, 1929, based on the International Convention for the Unification of certain Rules relating to Bills of Lading (*League of Nations Treaty Series*, vol. cxx, p. 155, Art. 9) provides that 'the monetary units mentioned in these Rules are to be taken to be gold value'. Similarly, see Art. 15 of the International Convention for the Unification of certain Rules relating to the limitation of the liability of owners of seagoing vessels (ibid., p. 125). According to *The Times* newspaper of 29 June 1945, p. 9, 'exactly what was in the minds of those who drafted and approved [this clause] is best known to them. Maritime lawyers have since recognized that claims have been customarily settled in this country on the basis of a maximum liability of £100 without regard to the gold clause'. No such 'custom' would be legally effective. The clause clearly refers to the gold value at the date when the Convention came into force.

[1] This is one of the principal points of Gutzwiller's book, *Der Geltungsbereich der Währungsvorschriften* (1940).

[2] *Nouveau Recueil général*, 2nd series, 31, p. 599; Malloy, op. cit., vol. ii, p. 1349.

undertook to make to Panama an annual payment of $250,000 in gold coin of the United States. When in 1933 the United States enacted legislation invalidating gold clauses, she refused to pay more than the nominal amount of the annuity. Panama did not accept the position that the municipal legislation of the United States could prejudice her treaty obligations. The dispute was settled by a Convention of 2 March 1936 by which the United States undertook to pay an annuity of 430,000 balboas, i.e. currency of Panama, the gold content of which was simultaneously reduced.[1]

IV

It is now possible to state broadly some of the conclusions which may be drawn from the preceding discussion.

1. States do not incur international responsibility by reason of their currency policy, except where it involves an abuse of rights or a breach of treaty obligations; the latter at present cover a very wide field and, indeed, have developed to an extent which indicates a substantial restriction of the monetary sovereignty of many states and may, in course of time, lead to the recognition by customary international law of restrictions of monetary sovereignty.

2. No state is under a general duty to protect actively the monetary system of another state. Exceptions exist in some cases, of which the following are the most important:

(*a*) Every state is bound to take adequate steps to prevent and punish the counterfeiting of another state's currency.

(*b*) A belligerent occupant, though entitled and frequently compelled to interfere drastically with the monetary system of the occupied territory, must act as an administrator and usufructuary, i.e. in a fiduciary capacity, particularly in regard to the maintenance of monetary values.

(*c*) As a result of treaty obligations many states are at present under a duty to give effect to implications of exchange restrictions imposed by other states; where such obligations exist, their observance is a matter of public policy for the courts of the state which has accepted them.

3. Where monetary obligations are created under public international law, difficulties arise from the interplay of international and municipal law necessitated by the fact that states must avail themselves of national currencies.

(*a*) The determination of the money of account is, in the case of an ambiguity in the treaty, a matter of liberal construction, while in the case of unliquidated claims liability will, in the absence of treaty provisions, usually be expressed in the currency of the claimant state.

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[1] *American Journal of International Law*, 34 (1940), (*Supplement*), p. 139, and the Note on p. 157. On the Convention see Wolsey in *American Journal of International Law*, 31 (1937), p. 300; Sauser-Hall in *Recueil des Cours de l'Académie de Droit International*, 60 (1937), pp. 653, 751.

(*b*) Monetary obligations contained in treaties are subject to the principle of nominalism even in those cases in which a state invokes its own monetary legislation or practice.

(*c*) There is no reason why international law should not in appropriate circumstances require the revalorization of monetary obligations arising from treaties or the rescission of treaties; international law will afford relief in respect of damage flowing from the depreciation of money, if the debtor state is in default.

(*d*) Gold or similar protective clauses cannot be implied in treaties, but where they are expressly stipulated, they will be broadly construed. They are subject to public international law and therefore not affected by municipal legislation abrogating them.

THE GENEVA CONVENTIONS OF 1949

By JOYCE A. C. GUTTERIDGE

I. *Introduction*

FROM 21 April to 12 August 1949 a Conference was held in Geneva, to which fifty-nine states sent delegations and at which four other states were represented by observers. Its purpose was the revision of the Convention of 1929 for the Amelioration of the Condition of Wounded and Sick of Armies in the Field and of the Convention of 1929 relative to the Treatment of Prisoners of War; the revision of the Tenth Hague Convention of 1907 for the adaptation to Maritime Warfare of the principles of the 'Geneva' Convention of 1906; and the preparation of a new Convention for the Protection of Civilian Persons in Time of War. On 12 August 1949 the Final Act of the Conference was signed, and the four new Conventions which were attached to it were opened for signature for a period of six months. By 12 February 1950, sixty-one of the states represented at the Conference had signed all four of the new Geneva Conventions, in some cases with reservations. At the time of writing no ratifications have, as yet, been deposited in respect of any of the Conventions. The United Kingdom signed all four of the new Conventions at a formal ceremony of signature held in Geneva on 6 December 1949, but made a reservation in respect of the second paragraph of Article 68 of the 'Civilians Convention' on signature of that Convention.[1]

Although the experience of the Second World War invested the proceedings of the Geneva Conference of 1949 with a new significance and emphasized both the respects in which the Conventions of 1929 and the Tenth Hague Convention were inadequate and the urgency of the need for a Convention for the Protection of Civilians, the revision of the 'Wounded and Sick' Convention and the preparation of a new 'Civilians' Convention had been considered in the years immediately preceding the Second World War.

The Fifteenth International Red Cross Conference, which was held in Tokyo in 1934, prepared a draft Convention 'Concerning the Condition of the Protection of Civilians of Enemy Nationality in the Territory of a Belligerent or in a Territory occupied by it.'[2] This draft Convention was the parent of the Geneva Convention of 12 August 1949 relative to the Treatment of Civilian Persons in Time of War, but was, in fact, little more than a bare outline to which many additions have since given life and substance. For example, Articles 79 to 141 of the Convention of 1949 consist of regulations for the treatment of internees, whilst the Tokyo draft merely provides (in Art. 17) that the Prisoners of War Convention is 'by analogy applicable to civilian internees whose treatment shall not in any case be inferior to that laid down in the Convention'. Again, the Convention of 1949 devotes thirty-one articles to the treatment of protected persons in occupied territory, but the Tokyo draft merely provided (in Art. 18) that the High Contracting Parties should 'undertake to observe . . . the provisions of Section III of the Regulations annexed to the Fourth Hague Convention', with the addition of certain provisions relating to hostages, deportations, communications, relief, and application to relief societies, all of which are briefly dealt with in one article in the Tokyo draft (Art. 19).

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[1] See below, p. 324 n. 1.

[2] The text is to be found in vol. iii (at pp. 57–63) of the *Preliminary Documents* submitted by the International Committee of the Red Cross to the 1947 Conference of Government Experts.

The Sixteenth International Red Cross Conference held in London in 1938 considered a revised draft, drawn up in 1937, of the 1929 'Wounded and Sick' Convention, as well as a revised draft of the Tenth Hague Convention of 1907 which stood in more immediate need of revision, since the 1906 'Wounded and Sick' Convention, the principles of which the Tenth Hague Convention applied to maritime warfare, had already been revised in 1929. Both these drafts, and the 'Tokyo' draft of a Convention for the Protection of Civilians, were placed on the agenda of a Diplomatic Conference called by the Swiss Federal authorities for the beginning of 1940, which was adjourned at the outbreak of the Second World War.[1]

After the close of hostilities, it was clear to the International Red Cross Committee that the experiences of the Second World War would need to be taken into consideration before the previously prepared drafts could be laid before a Diplomatic Conference. It was likewise clear, in the light of those experiences, that the Prisoners of War Convention of 1929 also required revision. A preliminary Conference of National Red Cross Societies was held from 26 July to 3 August 1946[2] to consider the matter, and as the result of the recommendation of that Conference, a Conference of Government Experts, at which the United Kingdom was represented, was convened by the International Red Cross Committee at Geneva from 14 to 26 April 1947.[3] On the basis of recommendations made, and drafts prepared, by the Conference of Government Experts, the International Red Cross Committee produced four draft Conventions, which were submitted to, and approved with certain amendments by, the Seventeenth Conference of the International Red Cross Committee held at Stockholm in August 1948. These drafts formed the 'working documents' of the Diplomatic Conference which opened at Geneva on 21 April 1949.

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[1] *Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions* (Geneva, 1947); Werner, *La Croix rouge et les Conventions de Genève* (1943), p. 390.

[2] Ibid.

[3] *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva, 1947).

II. *Relationship of the Geneva Conventions of 1949 to existing international Conventions*

In the preliminary discussion on the proposed new Conventions, a suggestion was put forward that there should be one composite Convention for the Protection of the Victims of War. The promoters of this idea argued that there would be certain provisions which would be common to all four of the proposed Conventions, and that general articles containing these provisions could be followed by separate parts or sections dealing with the protection of different categories of war victims. The objection that not all states might wish to become party to every part of this Convention was met by a reference to other 'composite' treaties, such as the London Treaty of 22 April 1930 for the Limitation and Reduction of Naval Armaments[1] in which provision had been made for separate acceptance of different parts of the treaty.

A more serious objection, however, was to be found in the different ancestry of each of the four proposed Conventions, and the relationship of three of them with other international Conventions for the mitigation of the evils of war which the Geneva Conference of 1949 was to have no mandate to revise.[2]

The Convention of 1949 for the Amelioration of the Wounded and Sick Armed Forces in the Field is directly descended from the first 'Geneva' Convention for the Amelioration of the Condition of Soldiers wounded in Armies in the Field which was signed on 22 August 1864, and which before 1949 had been twice revised, once in 1906 and once in 1929. In 1899, after a previously unsuccessful attempt in 1868,[3] the principles of the Geneva Convention of 1864 were adapted to maritime warfare in a Convention prepared by the first Hague Conference and signed by all the Powers represented thereat.[4] In 1907, the Hague Convention of 1899 was revised to accord with the revision of the 'Geneva' Convention in 1906 and became known as the Tenth Hague Convention. It is closely connected, as must be obvious, with the Hague Convention of 21 December 1904 relating to the exemption of hospital ships from port dues; with the Eleventh Hague

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[1] *Treaty Series*, No. 1 (1931), Cmd. 3758.

[2] That the Hague Conventions, and more particularly the Fourth to which the Regulations concerning the Laws and Customs of War on Land are annexed, are out of date and, generally, in need of revision, is obvious. They have been described as archaic and (although drafted in 1907) as speaking the language of nineteenth-century political institutions and of nineteenth-century war (Smith, 'The Government of Occupied Territory', in this *Year Book*, 21 (1944), p. 151). The extent to which the Hague Regulations have been amplified by the new 'Civilians' Convention is shown later in this article.

[3] Pearce Higgins, *The Hague Peace Conferences* (1909), p. 13.

[4] Ibid., p. 382.

Convention concerning Restrictions on Capture in Maritime War: and with the Eighteenth Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime War.

The Prisoners of War Convention of 1949 is directly descended from the Prisoners of War Convention of 1929 which is stated (in Art. 89 thereof) to be complementary to Chapter 2 of the Regulations annexed to the Hague Conventions concerning the Laws and Customs of War on Land of 29 July 1899 and 18 October 1907.

The Convention of 1949 for the protection of Civilian Persons in Time of War is likewise stated (in Art. 154 thereof) to be supplementary to Sections II and III of the Regulations annexed to the Hague Conventions of 1899 and 1907.

Since the Geneva Conference of 1949 had no mandate to revise any of the Hague Conventions other than the Tenth, it was not possible to weld into one composite Convention four separate draft Conventions, each of which had a different ancestry. Had such a composite Convention emerged with the title of a 'Convention for the Protection of Victims of War', that description would have been a misnomer, since the field covered would have been less wide than the title would have suggested.[1] It has, however, been recognized that the four Geneva Conventions of 1949 belong to a homogeneous group, and the most striking evidence of this is that each of the four new Conventions contains a number of articles which are common to all four Conventions. From the point of view of the international lawyer these articles are some of the most interesting in the Conventions, and it is therefore proposed to examine certain of them in some detail against the general background of international law.

III. *The common articles*

1. *Application of the Conventions*

Article 2 of each Convention contains the following provisions:

> 'The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by any of them.
>
> 'The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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[1] It is, of course, in any case obvious that there are certain aspects of the problem of protecting the victims of war which the Geneva Conventions of 1949 do not attempt to cover. The protection of the civilian population against air bombardment is one of these problems. The Fourteenth International Red Cross Conference held at Brussels in 1930 recommended that preliminary work be undertaken as a Draft Convention for the Protection of Civilians against Air Bombardment, but little work had been done on this subject before the Second World War intervened and the problem was made eventually both more urgent and more difficult by the advent of the atomic bomb. (For a more detailed account of the recommendation made by the Fourteenth International Red Cross Conference, see Werner, op. cit., pp. 398–9.)

> 'Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall, furthermore, be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.'

The first point to notice is the intention that the Conventions shall be applicable to war in the very widest sense in which that term can be defined. As Fauchille has said: 'Presque chaque juriste ou chaque publiciste a donné sa définition personnelle de la guerre.'[1] No attempt was made by the authors of the Geneva Conventions of 1949 to provide a comprehensive definition of war. It is, however, submitted that the definition proposed by Sir Arnold McNair in his article on 'The Legal Meaning of War and the Relation of War to Reprisals' is both sufficiently wide and generally acceptable. He wrote:[2]

> 'A state of war arises in International Law
> (*a*) at the moment, if any, specified in a declaration of war: or
> (*b*) if no time is specified, then immediately upon the communication of a declaration of war, or
> (*c*) upon the commission of an act of force, under the authority of a State, which is done *animo belligerendi*, or which being done *sine animo belligerendi*, but by way of reprisals or intervention, the other State elects to regard as creating a state of war, either by repelling force by force, or in some other way, retroactive effect being given to this election, so that the state of war arises on the commission of the act of force.'

It is a definition which most of the states who are parties to the Geneva Conventions would accept as the state of affairs which, subject to what is said below regarding an 'unrecognised' state of war, must exist before the Conventions become applicable.

There have, however, been circumstances in recent times in which opposing states have engaged in armed conflict on a large scale and have simultaneously disclaimed a decision to bring into being a state of war.[3] It is in order to secure the application of the Convention in such circumstances that those who drew up the Geneva Conventions added to the first paragraph of Article 2 the words 'even if the state of war is not recognised by one of them'. This appears to be a step towards the state of affairs which Professor Hyde hoped could be reached when he wrote, with the situation existing in 1937 between China and Japan in his mind:

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[1] *Droit International*, vol. ii (1921), s. 996.

[2] In *Transactions of the Grotius Society*, vol. xi (1926), p. 45.

[3] An outstanding example of this is the conflict between China and Japan in the years immediately preceding the Second World War. In August 1937 the Chairman of the U.S. Senate Committee on Foreign Relations stated: 'In the pending conflict, both Governments have denied that a state of war exists. China contends that she is only defending her territory against invasion and is ready to withdraw her troops from Shanghai as soon as Japan shall withdraw her armed forces from Shanghai. Japan, on the other hand, contends that she is not carrying war to China, but is simply conducting military operations for the purpose of protecting her nationals' (cited in Hyde, *International Law. Mainly as Interpreted and Applied by the United States* (2nd revised ed., 1945), vol. iii, p. 1687, note 5).

> 'As a means of safeguarding its essential interests, the international society may be expected ultimately to regard all international armed conflicts of outstanding dimensions, in which the combatants proceed to achieve their objectives by the sword, as within a single category and as yielding to a participant no greater or different privileges than it would to an avowed belligerent.'[1]

The second point of interest in Article 2 of the Conventions is the provision that 'the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party'. Again, the authors of the Geneva Conventions attempted no definition of 'occupation'. It is at least arguable—particularly as the Civilians Convention, the one in regard to which it is chiefly important to know what is meant by 'occupation', provides that the Convention is to be supplementary to those provisions of the Hague Regulations which deal with military authority over an occupied territory—that 'occupation' in the Geneva Convention means occupation as defined in Article 42 of the Hague Regulations which states that 'territory is considered to be occupied when it is actually placed under the authority of a hostile army'.

If this contention is accepted, it can also be argued that the Geneva Conventions of 1949, as well as the Hague Regulations, would not apply to a state of affairs such as came into existence in Germany at the close of the Second World War since 'a final victory which results in the destruction of the Government of the occupied territory and the cessation of all hostilities is of itself sufficient to end the state of belligerent occupation whether or not it is accompanied by the ending of a purely technical state of war'.[2] There is, however, no certainty that this point of view would be universally accepted. In advocating a contrary view, some reliance could, perhaps, be placed on Article 6 of the Civilians Convention which provides that 'in the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations', with the proviso that the Occupying Power 'shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory', by the provisions of certain articles of the Convention.

The third point of interest in Article 2 of each of the Conventions is the provision that 'although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall be bound by it in their mutual relations'. A similar provision is to be found in the second paragraph of Article 82 of the Prisoners of War Convention of 1929, and a totally dissimilar provision (which made the Tenth Hague Convention largely ineffective in the two World Wars) in Article 18 of the latter Convention which provides that 'the provisions of the present convention do not apply except between Contracting Powers, *and only if all the belligerents are parties to the Convention*'. An entirely new provision in Article 2 of each of the Geneva Conventions is that which binds the High Contracting Powers to apply the Convention in relation to a party to the conflict who is not a party to the Convention 'if the latter accepts and applies the provisions thereof'. The effectiveness of this latter provision is open to doubt since it will presumably be left to the belligerent which is a party to any particular Convention to determine whether or not an adversary, who is not a party thereto, is applying the provisions thereof.

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[1] Hyde, op. cit., vol. iii, p. 1688.

[2] Jennings in this *Year Book*, 23 (1946), p. 135.

2. *Application of the Conventions to Conflicts of a non-international character*

An entirely new conception which has been introduced into the Geneva Conventions of 1949 is that the parties to each Convention undertake certain obligations in respect, not of an international war, but of 'a conflict not of an international character occurring in the territory of one of the High Contracting Parties', which must normally mean a civil war. The drafting of the article (Art. 3) containing this undertaking gave rise to some of the most prolonged and difficult discussions at the Geneva Conference. The outcome has been that the obligations which the parties to each Convention assume under this article are limited in their character. They are, in fact, only such obligations as will ensure, even in internal conflicts, the observance of certain fundamental human rights. The provision of the article stipulates that persons taking no active part in the hostilities (who include members of armed forces who have laid down their arms, and are no longer participating in the conflict by reason of sickness, wounds, or captivity) shall be treated with humanity and, in particular, that violence to life and person, the taking of hostages, outrages upon personal dignity and the passing of sentence and the carrying out of execution without previous judgment by a regularly constituted court, are prohibited. Apart from these broadly humanitarian provisions, none of the other provisions of any of the Conventions apply except by means of special agreements entered into between the parties to the conflict.

This article of the Convention of 1949 replaces a provision in Article 2 of each of the draft Conventions drawn up by the International Red Cross Committee, which formed the working documents of the Conference. These draft Conventions imposed far more onerous obligations upon a legitimate Government which was a party to one or more of the Geneva Conventions since it provided that 'in all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, subject to the adverse Party likewise acting in obedience thereto'.[1] It is easy to see that an obligation of this kind, which must necessarily have restricted the activities of a legitimate Government in many spheres, was open to grave objections on the ground of impracticability. Had it been accepted it would almost certainly have remained a dead letter.

The present article is of a much more limited character. It was intentionally so drafted that the application of the Convention in the case of international conflicts should in no wise depend upon the recognition of insurgents as belligerents, either by outside states or by the legitimate Government. There is, at present, 'no question of international law conferring a right of recognition upon the belligerents or imposing a corresponding duty upon the lawful government'.[2] It seemed, therefore, of importance that the obligation on a legitimate Government to apply, in however limited a measure, the provisions of an international Convention to insurgents should not be taken as conferring upon insurgents any claim to recognition as belligerents or as imposing any duty of recognition upon the legitimate Government. An attempt to guard against any such implication is provided by the last paragraph, which states that 'the application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.

The appearance of an article of this kind in an international Convention is an innovation. However, it is an innovation which, it is submitted, is in accordance with the general trend of international law at the present time towards recognizing that 'the question of the observance of fundamental human rights has ceased to be one of exclusive domestic jurisdiction of States'.[3]

3. *The Protecting Power and Substitutes therefor*

Neither the Wounded and Sick Convention of 1929 (nor either of its predecessors), nor the Tenth Hague Convention contained any mention of the activities and functions of a Protecting Power. The Prisoners of War Convention of 1929, however, contained an article (Art. 87) concerning the Protecting Power, some of the provisions of which have been included in all four of the 1949 Geneva Conventions. The existence of a Protecting Power is clearly necessary to ensure the application of the Prisoners of War Convention and, in future, the application of the new Civilians Convention. But it is, perhaps, doubtful how far a Protecting Power will be able effectively to supervise the carrying out of the other two Conventions which provide for the amelioration of the condition of wounded and sick in armed forces in the field and in the course of maritime warfare. The presence of representatives of a Protecting Power during the progress of active operations, whether on land or at sea, is somewhat difficult to envisage. Only practical experience—should the need arise to apply these two Conventions—will show the value, or otherwise, of providing for their supervision by a Protecting Power.

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[1] *Revised and New Draft Conventions for the Protection of War Victims* (Geneva, 1948), p. 10.

[2] Lauterpacht, *Recognition in International Law* (1947), p. 243.

[3] Oppenheim, *International Law* (7th ed. by Lauterpacht, 1948), vol. i, p. 671.

An interesting development, due to situations which arose during the Second World War,[1] is an article common to all four Conventions which provides that the Detaining Power shall request a neutral state or 'an organisation which offers all guarantees of impartiality and efficacy' to act as a substitute for a Protecting Power where none can be appointed in the normal way by agreement between the belligerents. If no such neutral state or organization can be found, the Detaining Power may accept the services of a humanitarian organization, such as the International Red Cross, for the performance of the humanitarian duties usually carried out by a Protecting Power, but not, of course, its other duties.

The article providing for substitutes for the Protecting Power foreshadows, in its first paragraph, the creation of an international organization the function of which shall be to act as a Protecting Power where none exists. Elaborate proposals for this purpose were, in fact, put forward at the Geneva Conference by one Delegation, but the Conference decided that the creation of so complicated a piece of machinery was outside its competence and confined itself to passing a Resolution annexed to the Final Act which recommends that consideration be given as soon as possible to the advisability of setting up an organization of this kind.

4. *Procedure for the settlement of disputes*

Interesting proposals were put forward to the Geneva Conference for a group of articles, to be included in each of the new Geneva Conventions, which would provide complete machinery, stage by stage, for the settlement of disputes regarding the application and interpretation of these Conventions. The first step was to be the provision of a procedure for consultation between the belligerents, through the good offices of the Protecting Powers, on any question regarding the interpretation or application of the Conventions. This provision, which is based on Article 83 of the Prisoners of War Convention of 1929, has, in fact, been included in each of the new Conventions.

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[1] The examples present in the minds of everyone at the Geneva Conference were the situation of French prisoners of war after the capitulation of France, and the situation of German prisoners of war after the final surrender of Germany and the disappearance of a German Government. In the case of the former, arrangements were made between Vichy France and the Germans for 'protection' of French prisoners of war by a German dominated 'puppet' organization; to avoid a recurrence of that situation it is provided in each of the 1949 Conventions that no party thereto shall be able, by special agreement, to dispense with the necessity for the appointment of a substitute for the Protecting Power in the manner provided for in the Conventions when circumstances make such an appointment necessary.

The second step contemplated circumstances in which a definite dispute as to the application of the Convention has arisen between the belligerents, involving allegation of a breach of the Convention. This problem, however, presented considerable difficulties and the Conference rejected a draft article which envisaged an elaborate procedure for the investigation and settlement of disputes by a Commission of Inquiry, the members of which would be chosen in peace-time.[1] The procedure suggested appeared to be open to objections on the ground of impracticability, and the Conference fell back on the much simpler procedure provided in Article 30 of the Wounded and Sick Convention of 1929, under which, at the request of one of the belligerents, an inquiry shall be instituted in a manner to be decided between the interested parties, concerning any alleged violation of the Convention. The only addition to this provision is the stipulation that where the belligerents cannot decide in what way the inquiry shall be held they shall agree upon an umpire, who shall make this decision. It is, however, the case that in the circumstances of the Second World War, the procedure for investigation of disputes contained in Article 30 of the Wounded and Sick Convention of 1929 was never used. It remains to be seen whether these provisions, now common to all four Conventions, will prove effective in any future war.

The third step contemplated was intended to be resorted to only when the consultation and investigation procedure outlined in the other articles had failed. It consisted in a provision for reference to the International Court of Justice of disputes relating to the interpretation and application of the Convention. A number of Delegations represented at the Conference considered that recourse to the International Court of Justice by opposing belligerents would be impossible in time of war. They were influenced by the consideration that in a future war, as in the Second World War, the Court itself might be unable to sit. It was also argued that, during the continuance of hostilities, disputes regarding the application of the Conventions would need to be settled as rapidly as possible, thus making unsuitable recourse, even if otherwise possible, to the lengthy procedure of the International Court. Some Delegations considered, however, that disputes arising in peace-time, or after the general cessation of hostilities but before the conclusion of a peace treaty, might well be referred to the Court.[2] Certain Delegations, which were in favour of a reference to the Court, emphasized that a number of states which might be parties to the new Conventions had accepted the 'Optional Clause' (Art. 36) of the

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[1] This article was Art. 41 of the draft 'Wounded and Sick' Convention prepared by the International Red Cross Committee, but at the 1949 Conference it was proposed to insert it in all four Conventions.

[2] There might, for example, be a dispute as to whether a certain state of affairs, after the general cessation of hostilities, constituted an 'occupation' to which the Civilians Convention ought to apply.

Statute of the Court and were, therefore, already under an obligation to refer to the Court disputes concerning the interpretation of a treaty or the existence of any fact which, if established, would constitute a breach of an international obligation. The difficulty remained, however, that a number of states which were represented at the Conference and, therefore, likely to become parties to the Conventions, had not accepted the 'Optional Clause' and, in some cases, were not even parties to the Statute of the International Court.

In the end, the Conference reached the decision that none of the Conventions should contain an article providing for reference of disputes to the International Court, and the final stage of the procedure contemplated therefore finds no place in any of the new Geneva Conventions. There is, however, among the Resolutions annexed to the Final Act of the Conference one recommending that disputes regarding the interpretation or application of the Convention be referred, by agreement between the parties to the dispute, to the International Court if all other means of settling the dispute have been resorted to and have failed.

5. *Punishment of breaches of the Conventions*

Each of the Geneva Conventions of 1949 contains an article the first two paragraphs of which are as follows:

> 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may . . . if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.'

The two paragraphs quoted above represent the outcome of prolonged discussions and deliberations, at the Geneva Conference and beforehand,[1] the purpose of which was to ensure that some efficient procedure should be devised for bringing to justice those who violate the Geneva Conventions. At one time there was a strong tendency to advocate that provisions should be inserted in each of the new Geneva Conventions for the repression and punishment as 'war crimes' of acts constituting violations of the Conventions.[2] Several Delegations at the Geneva Conference—including that of the United Kingdom—objected to any reference in the new Geneva Convention to 'war crimes', on the ground that it would be premature, in view of the work to be undertaken by the International Law Commission set up by a Resolution of the General Assembly of the United Nations,[1] to attempt, within these Conventions, either a definition of a certain category of war crimes, or any provisions for the repression and punishment of war crimes, as such. This view prevailed, and the use of the term 'war crimes' has been scrupulously avoided in the Conventions. Instead, there are to be found, in each of the Conventions, the provisions already quoted for bringing to trial and punishing those who commit 'grave breaches' of that Convention. The expression 'grave breaches' is not exactly defined, but each Convention contains a list of acts which are to be regarded as 'grave breaches'. In general, these 'grave breaches' would be considered to be war crimes, if the definition be accepted that the latter are 'such offences against the laws of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity'.[2]

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[1] In consequence of a Resolution adopted at the Seventeenth International Red Cross Conference at Stockholm in 1948, four draft articles were drawn up by the International Red Cross Committee in co-operation with legal experts who met at Geneva in December 1948. The text of these articles and comments thereon are to be found at pp. 18–22 of *Remarks and Proposals submitted by the International Committee of the Red Cross* (Geneva, February 1949).

[2] See, for instance, p. 93 of the *Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions* where the recommendations of Commission II on this subject are set out.

In accordance with the decision that there should be no attempt in the Geneva Conventions to embark, in however rudimentary a fashion, on the settlement of a procedure for dealing with war crimes, the Conventions do not attempt to provide for the trial of 'grave breaches' thereof by any international tribunal, but contemplate only trial and sentence by the regularly constituted courts of parties to the conflict.[3]

Each state which becomes a party to any of the Geneva Conventions will have to consider what changes, if any, it needs to make in its own legislation to enable its criminal courts to have jurisdiction over, and to punish, the 'grave breaches' listed in the Convention, no matter where such breaches are committed or by whom they are committed. It is, perhaps, of interest to notice in this connexion that 'with regard to acts committed in the territory of the adversary, like maltreatment of prisoners of war, the belligerent may, in applying his municipal law to war criminals, rely on the rule which many States have adopted and which general international law has not stigmatized as illegal, that a State may punish criminal acts committed by foreigners abroad against its own safety or against its own nationals'.[1] Further, each state which becomes a party to any of the Geneva Conventions will also have to consider—though it should be pointed out that this provision is permissive and not mandatory—what arrangements it is prepared to make to hand over persons alleged to have committed 'grave breaches' of the Conventions to another High Contracting Party. Some, but not all, of the offences listed as 'grave breaches' would, for example, under the laws of the United Kingdom be regarded as 'extradition crimes'. Yet it is clearly not intended that persons who commit grave breaches of the Geneva Convention should only be handed over to another High Contracting Party for trial if an extradition treaty exists between the two states concerned. There is a further difficulty that certain of the 'grave breaches' listed in each Convention (e.g. deportation or transfer of 'protected persons') might, if a wide meaning is given to the term, be considered as 'political offences' which are not generally accepted as being extraditable.[2] These difficulties are, however, mentioned only in order to emphasize that, in the absence of general international agreement on this matter, the handing over from one state to another of persons alleged to have committed 'war crimes' or other similar offences is bound to be attended with difficulties. It is a matter which, it may be hoped, the International Law Commission will be prepared to consider.[3]

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[1] General Assembly Resolution 177 (II) adopted at the 123rd Plenary Meeting on 21 November 1947.

[2] Lauterpacht, 'Law of Nations and Punishment of War Crimes', in this *Year Book*, 21 (1944), at p. 79.

[3] The 'common article', the first two paragraphs of which have already been quoted, provides that persons accused of violations of the Conventions shall be afforded in all circumstances a proper trial and opportunities for defending themselves. As a 'yardstick' with which to measure these requirements reference is made to the provisions contained in the 1949 Prisoners of War Convention providing certain safeguards in connexion with trial and defence.

As a corollary to the provisions regarding the bringing to trial of persons alleged to have committed 'grave breaches of the Conventions', there is in each of the Conventions a further provision that 'no High Contracting Party shall be allowed to absolve itself, or any other High Contracting Party, of any liability incurred by itself or another High Contracting Party' in respect of 'grave breaches' of the Convention. This would seem to limit the freedom of the Contracting Parties in respect of future international undertakings, and may be open to objection on that ground. It becomes, however, less objectionable when it is realized that it relates only to liability for acts so heinous that no state which has regard to its obligations towards the comity of nations ought to seek to be relieved of any liability incurred in respect of them.

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[1] Lauterpacht, loc. cit., p. 63.

[2] In this connexion see Lauterpacht, loc. cit., p. 63; and Art. VII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide which provides that 'Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition'.

[3] Several multilateral treaties concluded after the close of the Second World War provided for the extradition of war criminals, e.g. Moscow Declaration of 30 October 1943, para. 4; London Agreement concerning the prosecution and punishment of major war criminals of the European Axis of 8 August 1945; and the Treaties of Peace with Italy (Art. 45), Roumania (Art. 6), Bulgaria (Art. 5), Finland (Art. 9), and Hungary (Art. 6), of 10 February 1947.

IV. *The new Geneva Conventions*

It is not possible, within the scope of this article, to consider in detail all the provisions of interest in each of the new Geneva Conventions. Accordingly, it is intended to indicate only those points in the revision of the three older Conventions which seem to be of particular interest and to give a general outline of the new Convention relative to the Protection of Civilian Persons in Time of War.

A. *Convention for the Amelioration of the Condition of Wounded and Sick of Armed Forces in the Field*[1]

Apart from the inclusion of the articles common to all four of the new Conventions, the Wounded and Sick Convention of 1949 is not markedly different from its predecessor, the 'Geneva' Convention of 1929. It is not, therefore, intended to examine its provisions at any great length, but only to indicate one or two points of special interest. The first concerns the status under the laws of war of medical personnel and chaplains which, according to some writers on international law, is not fully determined apart from what is provided in the Geneva Conventions of 1906 and 1929.[2] These Conventions accord to medical personnel and chaplains what a Swiss writer[3] has described as *un statut particulièrement favorable.* The discussions which took place at the Geneva Conference of 1949 showed with how much reluctance any inroads on this special status would be accepted. Nevertheless, the circumstances of modern war have shown the difficulty of implementing the provisions, contained in Article 12 of the 'Wounded and Sick Convention' of 1929, that medical personnel and chaplains 'may not be retained after they have fallen into the hands of the enemy', and the need for providing in the new Geneva Conventions for their treatment if they are, by necessity, retained. The provision in the Convention of 1929 has, therefore, been modified by a provision in the 'Wounded and Sick' Convention of 1949 (Art. 28) that medical personnel[4] and chaplains 'who fall into the hands of the adverse Party shall be retained only in so far as the state of health, the spiritual needs and the number of prisoners of war so requires'. This article goes on to provide that 'Personnel thus retained shall not be deemed prisoners of war', but nevertheless shall at least benefit by all the provisions of the Geneva Convention of 1949 relative to the Treatment of Prisoners of War and shall be given facilities, which are enumerated, for carrying out their medical and spiritual duties 'within the framework of the military laws and regulations of the Detaining Power'. It is also interesting to notice that the Prisoner of War Convention of 1949 now contains a special chapter dealing with 'Medical Personnel and Chaplains retained to assist Prisoners of War', although there is repeated, in that chapter, the provision in the 'Wounded and Sick' Convention that they shall not be considered as prisoners of war.

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[1] The wounded and sick protected by it are persons belonging to one of the six categories enumerated in the first part of Art. 4 of the 1949 Prisoners of War Convention to which reference will be made later.

[2] See, for instance, Hall, *International Law* (8th ed. 1924), p. 486. It was held by the United States Circuit Court of Appeals that a person who had joined the German Army as a Red Cross surgeon had not become an enemy as, under the Geneva Convention of 1906, Red Cross surgeons could not be regarded as forming part of the military forces proper: *Vowinckel* v. *First Federal Trust Co., Annual Digest,* 1925–6, Case No. 352.

[3] Werner, op. cit., p. 266.

[4] 'Medical personnel' are defined (in Art. 24) as those 'exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease' and 'Staff exclusively engaged in the administration of medical units and establishments'.

A further point of interest in the Convention of 1949 is the revision of the provisions relating to medical aircraft, which were contained in Article 18 of the Convention of 1929.[1] The protection given to such aircraft by Article 30 of the Convention of 1949 is only to be afforded if such aircraft are clearly marked and are flying 'at heights, times and on routes specifically agreed upon between the belligerents concerned'. There are also new provisions enabling such aircraft, provided they comply with certain requirements, to fly over the territory of a neutral Power, to land on it in case of necessity, and to use it as a port of call. In addition, there are provisions assimilating wounded and sick landed from such aircraft in neutral territory to wounded, sick, and shipwrecked landed from hospital ships at a neutral port. Similar rules are also contained in the 'Maritime' Convention which replaces the Tenth Hague Convention.

Another new provision of interest is Article 46 which prohibits reprisals against the wounded and sick as well as against personnel and buildings protected by the Convention. This rule is in line with the prohibition of reprisals which are now contained in the three other Geneva Conventions of 1949.

A complete innovation, contained in Article 23 of the Convention, is a provision that 'hospital zones and localities[2] so organized as to protect the wounded and sick from the effect of war' may be established by the High Contracting Parties in their own territory, either in peace-time, or after the outbreak of hostilities and in occupied areas during hostilities. The parties concerned may 'upon the outbreak and during the course of hostilities' conclude agreements on mutual recognition of the hospital zones and localities thus created. They may, if they wish, for this purpose, implement

[1] These provisions are designed to prevent the abuses of the use of 'medical aircraft' which occurred in the Second World War, e.g. the so-called medical aircraft used by the Germans which hovered over the Channel during the Battle of Britain (see Churchill, *Second World War*, vol. ii (1949), p. 284).

[2] The creation of such zones was proposed before the Second World War and Proposals for this purpose were presented to National Red Cross Societies by the International Red Cross Committee in April 1937 (Werner, op. cit., p. 401). The use or establishment of such zones for civilian wounded and sick is provided for in the Civilians Convention.

the provisions of a Draft Agreement annexed to the Convention, with such amendments as they consider necessary. It is to be noted that these provisions are all permissive and not mandatory; their value can only be demonstrated in the unhappy event of another war. It would appear to be very difficult to create such hospital zones and localities in any country, such as the United Kingdom, which has both a small geographical area and a large population.

B. *Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea*

The new Convention which is to replace, as between the parties thereto, the Tenth Hague Convention contains sixty-three articles, as compared with the twenty-six in the Tenth Hague Convention. A number of the articles, as has already been pointed out, are common to all four of the Conventions of 1949, and the most interesting of these have already been mentioned earlier. Of the remainder it is proposed to summarize those which principally illustrate the changes introduced to bring this Convention up to date and into line with the latest revision of its 'brother' Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field.

Articles 12 and 13 of the Convention of 1949 correspond to Article 11 of the Tenth Hague Convention and define the persons to be protected by the Convention. The Tenth Hague Convention protects 'sailors and soldiers and other persons officially attached to fleets and armies who are taken on board when sick or wounded'.[1] The 'Maritime' Convention of 1949 repeats the provisions of part of Article 4 of the Prisoners of War Convention of 1949, to which reference will be made later. Persons belonging to any of the six categories enumerated in the first part of Article 4 of the Prisoners of War Convention of 1949 are to be protected by the 'Maritime' Convention of 1949 if they are at sea and are wounded, sick, or shipwrecked. The term 'shipwrecked', it is provided, shall mean 'shipwreck from any cause' and 'includes forced landings at sea by or from aircraft'.

The provision as to the disposal of persons taken on board a belligerent warship or landed at a neutral port, contained in the Tenth Hague Convention are almost unaltered in the 'Maritime' Convention of 1949[2] of which Articles 16 and 17 correspond, in substance, to Articles 14 and 15 of the Tenth Hague Convention. The provision in Article 12 of the Tenth Hague Convention that all warships of a belligerent party shall have the right to demand the surrender of wounded, sick, and shipwrecked is also repeated in the Convention of 1949, with, however, a proviso that wounded and sick so surrendered must be in a fit state to be moved, and that the warship demanding their surrender must possess adequate facilities for any medical treatment necessary for them.

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[1] 'Persons officially attached to fleets or armies' were not protected by the Convention of 1899.

[2] The Convention of 1949 makes no provision for the two cases mentioned in Oppenheim (*International Law*, vol. ii (6th ed. by Lauterpacht, 1944), pp. 595–6) of shipwrecked soldiers or sailors reaching a neutral coast by their own efforts. Neither does it specifically provide for the disposal of wounded, sick, or shipwrecked brought into a neutral port by a neutral merchant ship, but the provision (in Art. 15) that it is wounded, sick, and shipwrecked brought into a neutral port by a neutral warship or neutral military aircraft who are to be prevented from taking any further part in the operations of war implies, and was meant to imply, that there is no generally recognized obligation to treat in the same manner wounded, sick, and shipwrecked arriving at a neutral port in a neutral merchant vessel or neutral civil aircraft.

The 'Maritime' Convention of 1949 contains, as has already been indicated, a number of provisions which are not to be found in the Tenth Hague Convention, and which must, therefore, be briefly noticed. There is a new clause in Article 22, which contains a definition of 'military hospital ships' corresponding to, but not identical with, that in Article 1 of the Tenth Hague Convention, which stipulates that not only the names but also descriptions of such ships (which includes registered gross tonnage, the length from stem to stem, and the number of masts and funnels), must be communicated between belligerents. Articles 26 and 27, which have no counterpart in the Tenth Hague Convention, are also of interest. Article 26 contains a recommendation that belligerents shall endeavour to use only hospital ships of over 2,000 tons gross for the transport of wounded, sick, and shipwrecked over long distances and on the high seas. This recommendation represents a compromise reached at the Geneva Conference between those Delegations which held that the Convention should contain provisions laying down a minimum tonnage for hospital ships and those which considered such a provision to be unduly restrictive. Article 27 provides for the protection of small craft used for the transport of wounded, sick, and shipwrecked 'so far as operational requirements permit'.

Article 29, which provides that a hospital ship in a port which falls into the hands of the enemy shall be authorized to leave such port, has no counterpart in the Tenth Hague Convention. Neither has Article 32, which provides that hospital ships are not assimilated to warships as regards their stay in a neutral port; nor Article 33, which provides that merchant ships which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities.

Other articles which have no equivalent in the Tenth Hague Convention are those concerned with the protection of medical transports (i.e. ships transporting equipment exclusively intended for medical purposes) and those relating to medical aircraft (Arts. 38 and 39). The latter are protected if flying at heights, at times, and on routes agreed upon by the belligerents. Article 40 provides for the flight of medical aircraft over neutral territory under certain prescribed conditions, and contains a provision which has the effect of assimilating wounded, sick, and shipwrecked landed from such aircraft in neutral territory to wounded, sick, and shipwrecked landed from hospital ships at a neutral port. There are, as has already been pointed out, similar provisions in the Convention of 1949 for the Amelioration of the Conditions of Wounded and Sick of Armed Forces in the Field.

Article 47 of the Convention of 1949 is also new. It prohibits reprisals against wounded, sick, and shipwrecked and against personnel, vessels, and equipment protected under the Convention.[1]

Other provisions of interest in the Convention of 1949 which are, however, not entirely new, are:

(i) The provisions (in Art. 31) as to the right of belligerents to control and search hospital ships, to decline their assistance, and to make them take a certain course. The Convention of 1949 provides that, in such circumstances, the belligerents may control the use of the wireless and other means of communication of such ships and may detain them for a period not exceeding seven days 'if the gravity of the circumstances so requires'. The right of belligerents to put a commission on board such ships is preserved, but there is an additional provision that the belligerents may either unilaterally or by special agreement put a neutral observer on board such ships to ensure that the provisions of the Convention are strictly carried out.

(ii) The rule in Article 43 regarding the marking of hospital ships prescribes a different method of marking from that previously provided and one which is considered to be more effective under modern conditions of warfare. Hospital ships and the other craft protected by the Convention are to be painted white with dark-red crosses displayed on each side of the hull and on the horizontal surfaces.

C. *Convention relative to the Treatment of Prisoners of War*

In commenting on the Prisoners of War Convention of 1949 it is proposed to survey certain features of the Convention in which it differs markedly from its predecessor, the Prisoners of War Convention of 1929. The first is the inclusion of an article (Art. 4) which categorically lists the persons who are 'prisoners of war in the sense of the present Convention'. The second is the provisions in the new Convention dealing with the transfer of prisoners of war from one High Contracting Party to another, a matter on which the Convention of 1929 was silent. The third is the inclusion of provisions regarding the granting of parole to prisoners of war. The fourth entails an examination, although not of a detailed nature, of the financial provisions; of the provisions relating to work; and of the disciplinary and judicial provisions of the new Convention since, in these parts of the Convention, there has been a notable advance on the provisions of the Convention of 1929.[1]

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[1] The United Kingdom, for humanitarian reasons, refused in the Second World War to take such measures of reprisal, despite attacks on hospital ships by Germany and Italy (Higgins and Colombos, *International Law of the Sea* (1943), section 551, p. 436).

'Prisoners of War' in the sense of the present Convention. Article 4 of the Convention of 1949 categorically lists the persons who, for the purposes of the Convention, are to be regarded as prisoners of war if they have 'fallen into the hands of the enemy'. Its provisions can usefully be contrasted with Articles 1 and 2 of the Convention of 1929 which simply provided that the Convention should apply to all persons referred to in Articles 1, 2, and 3 of the Hague Regulations and 'to all persons belonging to the armed forces of belligerents captured by the enemy in the course of operations of maritime or aerial war', with the additional provision (in Art. 81) that 'camp followers' should, if captured by the enemy, be treated as prisoners of war.[2]

Whilst it is not necessary to set out here in detail the categories enumerated in Article 4 of the Convention of 1949, in which all those persons who, for the purposes of the Convention of 1929, were to be regarded as prisoners of war are included, it would seem to be of interest to consider certain provisions of the article designed to remove obscurities and doubt left by the corresponding provisions of the Convention of 1929:

(i) It provides that members of 'organised resistance movements', fulfilling the four conditions listed in Article 1 of the Hague Regulations and here repeated, shall be treated as prisoners of war and assimilates them to 'members of militia and volunteer corps which do not form part of the armed forces of a belligerent'. The position of 'partisans' in international law has hitherto been a little uncertain. Bluntschli, writing before the Hague Regulations were first drawn up, and recalling, no doubt, the activities of the followers of Garibaldi, said:[3] 'Partisans corps and "free" corps are considered as enemies when they act under the orders of a Government, or when "persuadés de leur bon droit" they undertake a military operation and conduct themselves as troops organised in a military manner.' Hall discusses the problem of partisans and says:[4] 'the possession of belligerent privilege in such cases hinges upon subordination to a responsible person, who by his local prominence, coupled with the fact that he is obeyed by a large force, shows that he can cause the laws of war to be observed and that he can pursue isolated infractions of them if necessary'. There has, therefore, always been a case for holding that members of 'organised resistance movements' conforming to the requirements of Article 1 of the Hague Regulations should be treated in the same way, if captured, as members of volunteer or militia corps, but experience of resistance movements during the Second World War showed that this was by no means universally recognized, and Article 4 of the Prisoners of War Convention of 1949 may be regarded as having, in this respect, resolved a hitherto doubtful point.

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[1] A study group of the Institute of World Polity, consisting of former American prisoners of war who were also students of International Law, drew up a report published by the Institute in 1948, on the subject of prisoners of war, in which the deficiencies of the Convention of 1929 were pointed out (see review in this *Year Book*, 25 (1948), p. 484).

[2] The fourth category of persons who are prisoners of war, in the sense of the Convention of 1949, consists of 'persons who accompany the armed forces without actually belonging thereto' provided they have received authorization from the armed forces which they accompany. In the examples given of such persons, the 'sutler' who followed armies in the field in the wars of the nineteenth century is no longer included.

[3] Bluntschli, *Le Droit international codifié* (translated from the German by Lardy, 1870), Art. 570; cited by Werner, op. cit., p. 264.

[4] *International Law* (8th ed. by Pearce Higgins, 1926), p. 619.

(ii) Article 4 also provides that 'members of regular armed forces who profess allegiance to a government or authority not recognised by the "Detaining Power" shall be treated, if captured, as prisoners of war'. This provision was included with the case of the followers of General de Gaulle in the Second World War prominently in mind.

(iii) For the first time, members of crews of the merchant marine and members of crews of civil aircraft are included amongst the persons who are to be treated as prisoners of war if captured, provided they 'do not benefit by more favourable treatment under any other provision of international law'. This proviso was added because, in particular, Article 6 of the Eleventh Hague Convention, which still remains in force as between parties to that Convention, provides that the captain, officers, and members of the crew of an enemy merchant ship, if nationals of the enemy state, are not made prisoners of war if they give a formal written promise not to engage, while hostilities last, in any service connected with the operation of the war.

(iv) Article 1 of the Convention of 1929, by its reference to Article 2 of the Hague Regulations which applies to a levy *en masse*, provided that 'inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces shall, if captured, be treated as prisoners of war'. This provision has been repeated in the Convention of 1949 by including those taking part in a levy *en masse*, in the circumstances defined in Article 2 of the Hague Regulations, amongst the categories of persons entitled to be treated as prisoners of war. There was an attempt, during the Conference, to widen this rule by including in it a levy *en masse* of the inhabitants of occupied territory who spontaneously take up arms against the occupying forces.[1] However, the Conference rejected this proposal on the ground that, after invasion has become occupation, the only persons who are entitled, if captured whilst bearing arms against the enemy, to be treated as prisoners of war, are members of organized resistance movements for whom, as has already been seen, provision is now made in this article.

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[1] Werner, op. cit., p. 265, considered that persons taking part in such an uprising ought to be considered and treated as legitimate combatants because of the provision of the Preamble to the Fourth Hague Convention which provides that 'in cases not included in the Regulations . . . populations and belligerents remain under the protection and the rule of the principles of the law of nations' and declares that 'it is in this sense especially that Articles 1 and 2 of the Regulations adopted may be understood'.

(v) With the experiences of, particularly, French and Dutch troops in the Second World War in mind, Article 4 of the Convention of 1949 also provides that 'persons belonging, or having belonged, to the armed forces of an occupied country shall be treated as prisoners of war if the Occupying Power decides to intern them' even though it has originally liberated them while hostilities were going on outside the territory it occupies.

(vi) Article 4 also makes provision for the limited application of the Prisoners of War Convention, without prejudice to any more favourable treatment which such Powers may choose to give, to persons entitled to be treated as prisoners of war 'who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under International Law'.

During the discussions on Article 4 of the Prisoners of War Convention at the Geneva Conference, an attempt was made to extend the application of the Prisoners of War Convention to still further categories of persons, particularly civilians who, as individuals and not as part of a levy *en masse*, have taken up arms to defend their lives and property under an attack which violates the laws of war. It was generally held, however, that these persons, unless members of organized resistance movements, were not entitled to the protection of the Prisoners of War Convention, and that it would mean a fundamental change in the laws of war to admit them to its protection. It was emphasized that once an illegal war, e.g. a war of aggression, has started, it must be governed by the normal laws and customs of war, and that to derogate from the rules of war in any one respect, in such circumstances, would lead eventually to anarchy.

Responsibility for prisoners of war transferred from one Power to another. The Convention of 1929 was silent on this point, and practical difficulties were, in fact, encountered during the Second World War as the result of uncertainty as to how far a Power transferring prisoners of war was still responsible for ensuring that the provisions of the Prisoners of War Convention were carried out in respect of them. The Convention of 1949 provides (in Art. 12) that 'prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention, and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention'. Responsibility for prisoners of war so transferred rests on the Power accepting them whilst they are in its custody.[1] There is, however, also a provision that, if the transferee Power fails to carry out the provisions of the Convention in any important respect, the transferring Power may request the return of the transferred prisoners of war, which request must be complied with by the transferee Power.

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[1] The U.S.S.R. and certain other of the Eastern European states have made a reservation to

Parole. Article 21 of the Prisoners of War Convention of 1949 introduces for the first time into that Convention rules as to parole, which are to be found in Articles 10 to 12 of the Hague Regulations but which were not included in the Prisoners of War Convention of 1929, which otherwise incorporated all the provisions of the Hague Regulations relating to prisoners of war. The second and third paragraphs of Article 21 of the Convention of 1949 repeat, in substance, the provisions of Articles 10 and 11 of the Hague Regulations, but Article 12 of the Regulations, which provides that a prisoner of war who is liberated on parole and recaptured bearing arms against the Government which liberated him or its allies, forfeits his right to be treated as a prisoner of war, is not included in the Convention of 1949.

General provisions. (*a*) *Financial provisions.* There is only one article (Art. 34) in the Prisoners of War Convention of 1929 dealing with the financial resources of prisoners of war and this is concerned only with working pay, which also forms the subject of Article 62 of the Convention of 1949. The general question of the financial resources of prisoners of war has been dealt with very much more fully in the Convention of 1949, which devotes eleven articles to the subject and thus, in this respect, fills in a decided gap in the Convention of 1929. The principal points of interest are briefly indicated below.

Article 60 introduces for the first time into the Convention a provision that a monthly advance of pay shall be granted by the Detaining Power to *all* prisoners of war, both officers and 'other ranks'. The amount of such advance, calculated in Swiss francs, is stated. It varies with the rank of the prisoner—from 8 Swiss francs in the case of prisoners below the rank of sergeant to 75 Swiss francs in the case of a general. The amount of such advances may be modified by agreement between the belligerents. Pending such agreements, the *amount made available to prisoners of war for their own use* may be limited if the amount specified would be unduly high compared with the pay of the Detaining Power's armed forces or would, for any other reason, seriously embarrass the Detaining Power. Article 67 provides that the advances of pay with which Article 60 deals shall be considered as made on behalf of the Power 'on which the prisoner of war depends', i.e. the Power in whose armed forces he was serving at the time of capture.

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this article on signature of the Prisoners of War Convention, in the sense that, notwithstanding the provisions of Art. 12, the states making this reservation will hold the original Detaining Power (i.e. the Power which captured the prisoners of war) as responsible for the application of the Convention.

Provision is made, in other articles, for an account to be kept for each prisoner of war in which all amounts due to him or received by him or taken from him are to be shown, and which he is to have reasonable facilities for inspecting.

The 'working pay' of prisoners of war is dealt with in Article 62 of the Convention of 1949 which provides that the rate shall be fixed by the detaining authorities but at no time shall be less than one-fourth of one Swiss franc for a full working day. Article 34 of the Convention of 1929, on the other hand, provided that the amount of working pay was to be fixed by agreement between the belligerents, although it laid down certain standards to be followed pending the conclusion of such agreement. Another difference between the two Conventions, in this respect, is that the Convention of 1929 laid down that prisoners of war should *not* receive pay for work in connexion with the administration, internal arrangement, and maintenance of camps, whilst the Convention of 1949 provides that working pay shall be given to prisoners permanently detailed for such work, as well as to prisoners of war required to carry out spiritual or medical duties on behalf of their comrades.[1]

(*b*) *Work of prisoners of war*. Article 50 of the Prisoners of War Convention of 1949 is an elaboration and clarification of Article 31 of the Convention of 1929. Instead of providing merely that work done by prisoners of war shall have no direct connexion with the operations of the war, Article 50 of the Convention of 1949 specifies six categories of work, unconnected with the purposes or operations of the war on which, and (with the exception of work connected with camp maintenance) only on which, prisoners of war may be compulsorily employed. Another difference from the Convention of 1929 is that there is no longer the absolute prohibition of unhealthy or dangerous work which is contained in Article 32 of the latter Convention. Instead, Article 52 of the Convention of 1949 provides that no prisoner of war, *unless he volunteers for such work*, may be employed on unhealthy or dangerous work. If he so volunteers, he is to be given (under Art. 51) adequate training and means of protection. Further, no prisoner of war is to be employed on work which would be considered as degrading or humiliating for members of the Detaining Power's own forces.

(*c*) *Disciplinary and judicial provisions*. An examination of Chapter 3 of Section V of the Convention of 1929 disclosed that there were many gaps in the provisions dealing with disciplinary and judicial measures and proceedings against prisoners of war, and that further safeguards were needed. At the Geneva Conference, a special Sub-Committee considered this matter and issued a report and a draft text, on which the changes now made were largely based.

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[1] The persons here referred to are not 'medical personnel' (as defined in Art. 24 of the 'Wounded and Sick' Convention of 1949) or chaplains to the Forces, but persons serving in other capacities who have either medical or religious qualifications.

Some of the further safeguards introduced are intended to prevent practices followed by the Germans and by the Japanese in the Second World War. An instance of this is Article 84, which has no counterpart in the Convention of 1929, and which: (i) provides that a prisoner of war shall be tried only by a military court unless the existing laws of the Detaining Power permit a member of its own armed forces, in respect of the particular offence alleged, to be tried by a civil court; and (ii) prohibits trial by any court which does not offer the essential guarantees of independence and impartiality. A further article—the substance of which is contained in Article 52 (3) of the 1929 Convention—provides that no prisoner of war shall be punished more than once for the same act or on the same charge. More emphasis is given to this prohibition in the Convention of 1949 by making it the subject of a separate article and by placing it near the forefront of the penal provisions. A provision of particular interest is Article 85 which lays down that prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the Convention. This rule is entirely new, and was the cause of much discussion and controversy during the Geneva Conference. A body of opinion was in favour of excluding convicted 'war criminals', although not those persons accused of 'war crimes', from the benefits of the Convention. The majority opinion which prevailed was that even prisoners of war convicted of 'war crimes' should be entitled to the same treatment as that provided in the Convention for any prisoner of war convicted of an offence under the laws of the Detaining Power, i.e. humane treatment whilst undergoing imprisonment, certain safeguards regarding the carrying out of the death penalty, and access by the Protecting Power.[1]

There is a general inclination in the Convention of 1929 to provide that, whenever possible, offences by prisoners of war shall be dealt with as disciplinary offences, and thus to perpetuate *la tendance libérale* which characterized the treatment of prisoners of war as prescribed by the Convention of 1929.[2] It was recognized, however, that even in respect of disciplinary procedure further safeguards were necessary. Article 96, for instance, which is concerned with the summary disposal of disciplinary offences, provides that disciplinary powers may in no case be delegated to or exercised by a prisoner of war; that a prisoner of war accused of a disciplinary offence shall be given the opportunity of defending himself; and that a record of disciplinary punishments shall be maintained and shall be open to inspection by representatives of the Protecting Power. There is also an article (Art. 89) which specifically lists the disciplinary punishments which may be given to prisoners of war. These consist of fines; discontinuance of privileges; fatigue duties (except in the case of officers); and confinement. They do not include the 'punishment diet' which was permissible under Article 55 of the Convention of 1929.

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[1] The decision reached does not in any way run contrary to the practice and doctrine of international law that a belligerent is entitled to punish for war crimes those members of the armed forces of the adversary who fall into its hands. It does, however, deny the assertion made by Moser in the eighteenth century (and endorsed by the Institute of International Law about a hundred years later) that 'enemy combatants who act contrary to international law need not when they fall into the hands of the belligerent, be treated as prisoners of war, but may be treated as robbers, murderers and so on'. See Lauterpacht, 'Law of Nations and Punishment of War Crimes', in this *Year Book*, 21 (1944), pp. 61–2.

[2] Werner, op. cit., pp. 316–21.

In the case of judicial proceedings, further safeguards were also found to be necessary. Article 99 contains a new provision to the effect that no prisoner of war may be sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time such act was committed. The words 'or by international law' were inserted to remove any uncertainty as to whether 'war crimes' alleged to have been committed by prisoners of war could be tried by the courts of the Detaining Power.[1]

Other safeguards consist in a provision that in the case of prisoners of war the death penalty cannot be carried out before the expiration of six months (as opposed to three in the Convention of 1929) from the date of notification to the Protecting Power; in a provision that pre-trial confinement shall be limited to three months and deducted from any sentence of imprisonment awarded; and in the amplification of the provisions as to rights of defence and appeal already contained in the Convention of 1929. Further it is laid down that prisoners of war and the Protecting Powers shall be informed of all offences punishable by death under the laws of the Detaining Power and that other offences shall not thereafter be made punishable by death, in the case of prisoners of war, 'without the concurrence of the Power upon which the prisoners of war depend'.

D. *Convention for the Protection of Civilian Persons in time of War*

The Civilians Convention of 1949 deserves to be considered at somewhat greater length than the three other Geneva Conventions of that year. For it is not a revision of any existing Convention, already tried in the fire of experience, but an entirely new venture. To some extent, it is declaratory of existing principles of international law, but in a large measure it lays down new principles which are to become part of that law. It is expressed (in Art. 154) to be supplementary to Sections II and III of the Hague Regulations, but it was drawn up against the background of two World Wars and is therefore far removed from the conceptions of the circumstances of war which dominated those who first framed the Hague Regulations in 1899, and which still prevailed in 1907 when they were revised. The preparatory work undertaken by the International Red Cross Committee in connexion with the preparation of a draft Convention for the Protection of Civilians has already been mentioned. This work was interrupted by the war which 'a démontré les faits que les craintes exprimées quant au sort des populations civiles n'étaient pas chimériques', but the suffering undergone by thousands of civilians enabled a Swiss jurist writing in 1943 to express the hope that 'cette expérience aura partout mûri le désir d'une protection juridique efficace des populations civiles contre la guerre'.[1]

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[1] This question is discussed by Lauterpacht, loc. cit., pp. 61–8, who finds (at p. 67) 'no novelty about the principle that a belligerent is entitled to punish such perpetrators of war crimes as fall into his hands; that that principle, far from being a mere assertion of power, grudgingly assented to by international law, on the part of the fortunate belligerent, is, in turn, grounded in the fact of recognition by international law of the jurisdiction of States based on the territorial and cognate principles as well as in the fact that in punishing war criminals the belligerent applies and enforces . . . the rules of the law of nations which are binding upon the individual members of the armed forces of all belligerents'.

The full title of the Civilians Convention is misleading. It is not, as might seem to be implied, a Convention for the protection of *all* civilians in *all* circumstances in time of war. The difficulties which confronted those who drew up the Convention were intensified by the impossibility in the circumstances of modern war of drawing the rigid line which used to divide members of combatant forces and civilians. The distinction between members of the armed forces and civilians has, it is generally appreciated, been affected during the present century by five developments:[2]

(i) the growth of the number of combatants;
(ii) the growth of the number of non-combatants engaged in war preparations;
(iii) the development of aerial warfare;
(iv) economic measures which result in the civilian population being no longer immune from the hardships and privations of war;
(v) the advent of totalitarian states in which the life and property of the individual are entirely dominated by the state and utilized in a rigidly regimented fashion for the purpose of the war economy.

Of these factors it is the growth of the number of non-combatants engaged in activities connected with the prosecution of war which has, perhaps, done most to blur the distinction between combatants and non-combatants. The problem has been considered by a number of authorities on international law, who have given their views on the extent to which civilians engaged in furtherance of the war effort are entitled to be protected from the consequences of war. Professor Hyde, for instance, maintains that individual members of the civilian population may be regarded as strictly non-combatant 'so long as they refrain from the commission of affirmative hostile acts directed against enemy forces'.[1]

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[1] Werner, op. cit., p. 399.

[2] Oppenheim, *International Law*, vol. ii (6th ed. by Lauterpacht, 1944), p. 171.

The purpose of the Civilians Convention of 1949 (with the exception of Part II which has a wider application) is therefore not to protect *all* civilians in time of war, but to protect certain categories of civilians, referred to in the Convention as 'protected persons',[2] whom the circumstances of war have placed under special disabilities. The first category is the alien who finds himself on the outbreak of war in the territory of a belligerent. This category does not include nationals of a neutral state or nationals of a co-belligerent state, so long as such states have normal diplomatic representation in the territory of the belligerent. The second category consists of members of the civilian population in occupied territory. Persons in both these categories may, it has been recognized, be subjected to internment, and detailed regulations which follow closely—perhaps too closely—the provisions of the Prisoners of War Convention of 1949 have been drawn up regarding internees.

An attempt has also been made, in Article 5 of the Convention, to deal with the problem of the protected person who is 'definitely suspected of or engaged in activities hostile to' the state or the Occupying Power, as the case may be. On the one hand, there had to be taken into account legitimate considerations of state security and the responsibility of an Occupying Power for ensuring the safety of its own forces. On the other hand, there existed the well-grounded fear lest a provision in the Convention that, in certain circumstances, protected persons could be excluded from its benefits would open the door to abuses of the Convention and a large-scale withdrawal of the protection afforded by it. It has, therefore, finally been provided that, in the territory of a belligerent, a person 'definitely suspected of or engaged in activities hostile to the State' shall not be able to claim any rights and privileges under the Convention which would be prejudicial to the security of the state, and that in occupied territory such persons, or those who are detained as spies or as saboteurs,[3] are 'where absolute military security so requires' to be regarded as having forfeited rights of communication under the Convention. All such persons, however, are to be treated with humanity, and in the case of trial are not to be deprived of the rights of a fair and regular trial prescribed by the Convention.

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[1] Op. cit., vol. iii, p. 1800.

[2] Art. 4 of the Convention defines persons protected thereunder as 'those who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation in the hands of a party to the conflict or occupying power of which they are not nationals', but goes on, as is pointed out above, to exclude such persons as are protected by normal diplomatic representation.

[3] This provision does not, of course, mean that spies and saboteurs in occupied territory cannot be punished. There is nothing in the Civilians Convention which denies the generally recognized customary rule of international law that hostile acts on the part of private individuals are not legitimate warfare (see Oppenheim, op. cit., p. 170) but, just as Art. 30 of the Hague Regulations declares that a spy may not be punished without trial before a court martial, so the new Civilian Convention refuses to deny rights of any kind to 'protected persons' who are accused of being spies or saboteurs.

Part II of the Convention is designed to afford a general protection to civilians against certain consequences of war. Its provisions extend to 'the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion'. The second and third articles of Part II (Arts. 14 and 15) are concerned with the establishment of hospitals and safety zones[1] and neutralized zones, which may be created by agreement between belligerents based on the draft agreements annexed to the Convention. These provisions, which aim at sheltering from the effects of war certain classes of civilians who take no part in hostilities and perform no work of a military character, are not, as has already been mentioned, mandatory on the parties to the Convention. In general these provisions take into account the wearing away of the distinction between combatants and non-combatants in modern war, and are designed to afford special protection only to such civilians as are taking no active part in the war effort.

Other articles of Part II afford protection to civilian hospitals which 'may in no circumstances be the object of attack but shall at all times be respected and protected by the parties to the conflict' and which are entitled to be marked by the Red Cross 'but only if so authorised by the State' (Art. 18). Protection is also to be given to persons caring for civilian wounded and sick (Art. 20) and to the means of transporting them, including, under the same conditions as in the Wounded and Sick Convention of 1949, medical aircraft (Arts. 21 and 22). The Convention also includes an article which permits, but only under conditions designed to prevent such supplies being diverted from their proper purpose, free passage of medical and hospital stores and essential foodstuffs and clothing for children under fifteen, expectant mothers, and maternity cases (Art. 23). A further article is designed to ensure the care of children under fifteen 'orphaned or separated from their families as the result of war' and to facilitate their reception in neutral countries (Art. 24).

Section I, Part III, of the Convention contains a number of provisions regarding the status and treatment of protected persons which are common both to the territories of parties to the conflict and occupied territories. In general, these provisions are an amplification of Articles 46 and 47 of the Hague Regulations which, applying only to occupied territory, provided that 'family honour and rights, individual lives and private property, as well as religious convictions and liberty of worship' must be respected, and that pillage should be prohibited. The Convention of 1949 contains definite prohibitions against the taking of hostages, reprisals, and collective penalties (Art. 33). Also, in the light of the grim experiences of the Second World War, it includes provisions against 'any measures of such a character as to cause the physical suffering or extermination'[1] of protected persons (Art. 32). In order to ensure the application of this part of the Convention, it lays down that protected persons shall have access to the Protecting Power and to the International Red Cross Committee as well as to any other organization which is prepared to assist them (Art. 30).

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[1] The establishment of safety zones was proposed in a letter written in December 1930 by General Saint-Paul to the *Revue Internationale de la Croix-Rouge*, who suggested that the name 'Lieux de Genève' should be given to such zones (Werner, op. cit., pp. 400, 401).

Section II of Part III of the Convention refers to the protection of 'aliens in the territory of a party to the conflict'. It provides, in the first place, for such persons to be able to leave the territory at the outset of or during a conflict 'unless their departure is contrary to the national interests of the State' (Art. 35). The remaining articles of this section are devoted to provisions designed to give the protected persons in the territory of a belligerent such additional protection as their situation requires, and which, in normal circumstances, would be afforded to aliens by means of diplomatic representation. There are, in particular, limitations on the internment or placing in assigned residence of protected persons which 'may be ordered only if the security of the detaining Power makes it absolutely necessary' (Art. 42); and provisions (in Art. 46) regarding the transfer to another High Contracting Party, similar to those in Article 12 of the Prisoners of War Convention which have already been considered; and a provision that protected persons in enemy territory may not be compelled to undertake any work which is directly related to the conduct of military operations (Art. 40).

Section III of Part III of the Convention is concerned with occupied territories[2] and is designed to fill in gaps in Articles 42 to 56 of the Hague Regulations, which, although brought to notice after the First World War by such writers as Garner,[3] remained unfilled and the existence of which was emphasized to an unprecedented extent by the German occupation of several European countries in the Second World War. It must be repeated, however, that the Geneva Conference of 1949 had no mandate to *revise* the Fourth Hague Convention or the Regulations annexed to it, and that the Conference had therefore to bear in mind that their task was only to *supplement* Section III of the Hague Regulations (Military Authority Over the Territory of a Hostile State), not to abrogate or fundamentally to alter that section. In considering how the provisions of the Hague Regulations regarding occupied territory could be supplemented and amplified, use was made of the experience of those states which, towards the end of the Second World War, found themselves in occupation of enemy territory.[1] It is of interest, in this connexion, to study the proclamations, laws, and ordinances issued by the Allied Military Governments both in Italy and in Germany.[2]

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[1] Any state which becomes a party to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 will already be under an obligation to forbid, repress, and punish offences of this kind whether they be committed against persons protected by the Civilians Convention of 1949 or not.

[2] Art. 6 of the Convention provides that in the case of occupied territory, the application of the Convention shall cease one year after the general close of military operations. Nevertheless, an Occupying Power which exercises the functions of government in such territory remains bound for the duration of the occupation by certain provisions of the Convention which can be shortly stated to be those ensuring to the inhabitants of the occupied territory certain fundamental human rights.

[3] *International Law and the World War* (1920), vol. ii, chs. xxiii–xxvii.

There are two important provisions in Section III of Part III of the Convention. The first is the prohibition of 'individual or mass forcible transfers as well as deportations'[3] of protected persons from occupied territory (Art. 49). The second is the prohibition, not only of any compulsion on the inhabitants of occupied territory to engage in military operations against their own country (which is to be found in Article 44 of the Hague Regulations), but also of any compulsion to engage in work which is not necessary 'either for the needs of the army of occupation, or for the public services, or for the feeding, sheltering, clothing or transportation or health of the population of the occupied territory' (Art. 51).

A further provision of interest and importance, in the light of what happened in the Second World War, is the provision (in Art. 54) that 'the Occupying Power may not alter the status of public officials or judges in the occupied territories or in any way apply sanctions to or take any measures of coercion or discrimination against them should they desist from fulfilling their functions for reasons of conscience'. This rule is linked up with the further provision in Article 64 which stipulates that 'the penal laws of the occupied territory shall remain in force with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the Convention', and that 'subject to the latter consideration and to the necessity for ensuring effective administration of justice the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws'. This is an amplification and clarification of Article 43 of the Hague Regulations which merely provided that the Occupying Power should respect, 'unless absolutely prevented, the laws in force in the occupied territory'.

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[1] The problem of the government of occupied territory towards the conclusion of the Second World War is examined in a note written for this *Year Book*, 21 (1944), pp. 151–5, by Professor Smith, who annexes the text of Proclamation No. 1 issued in the case of Sicily and adjacent islands.

[2] It is, in particular, worth studying the first number of the *Military Government Gazette* issued in Germany by the Sixth Army Group which contains, *inter alia*, a Proclamation establishing, as from 18 September 1944, military government in parts of Germany, and also a number of Ordinances and Laws dealing with the administration of the occupied territory. Although these enactments of a Military Government are not always consistent with those provisions which are now to be found in the Civilians Convention, it is of interest to note, for example, that Ordinance No. 2, which sets up military government courts, provides for the rights of defence and safeguards relating to trial which are not less favourable than those now to be found in the Civilians Convention.

[3] The deportations from France and Belgium during the First World War which were carried out extensively by the Germans have been fully considered by Garner, op cit., vol. ii, ch. xxvii, in which he records the German attempts to justify those measures and concludes by saying (at p. 184): 'When everything is said in defence of the German policy that can be said, it has little left to stand on and it is hard to see how any humane voice can be raised in defence of it.'

Articles 67 to 75 of this part of the Civilians Convention are designed to ensure that protected persons in occupied territory who are tried by the competent courts of the Occupying Power shall receive a fair trial, with adequate safeguards, and shall be given every opportunity of defending themselves. In connexion with these provisions there are several points of special interest. There is, first of all, the rule in Article 65 that any penal legislation enacted by the Occupying Power shall not come into force until it has been published and brought to the knowledge of the civilian population in their own language, and that the effect of such legislation shall not be retroactive. Article 68 is concerned with offences by protected persons against the security of the Occupying Power. It lays down that any such offence which does not 'constitute an attempt on the life or limb of members of the occupying forces or administration nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them' shall render protected persons liable only to internment or simple imprisonment 'provided that the duration of such internment or imprisonment is proportionate to the offence committed'. The more serious offences against the security of the Occupying Power, i.e. cases of espionage and serious acts of sabotage against the military installations of the Occupying Power or intentional offences which have caused the death of one or more persons may be punished by death 'provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began'.[1] The other provisions relating to the trial and defence of protected persons are very largely the same as those which are to be found in the Prisoners of War Convention of 1949 and provide for a fair trial and adequate means of defence.

The Convention lays on the Occupying Power an obligation to ensure the food and medical supplies of the civilian population 'to the fullest extent of the means available to it' (Art. 55) and to maintain with the co-operation of the authorities of the territory medical and hospital establishments and services and public health and hygiene in the occupied territory (Art. 56). It is also specifically provided in Article 55 that the occupying Power may only requisition foodstuffs, articles, or medical supplies available in the occupied territory for its own use if the requirements of the civilian population have been taken into account. These provisions go very far beyond anything which is to be found in the Hague Regulations. It may possibly be thought that they go too far. It has previously been held that the administration of the Occupying Power is in no wise to be compared with ordinary administration, for it is 'distinctly and precisely military administration',[1] and that the Occupying Power has 'only a right to such control as is necessary for the safety and success of its operations' and so 'must use his power within the limits defined by the fundamental notion of occupation and with due reference to its transient character'.[2]

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[1] The United Kingdom (as well as certain other countries, including the United States of America) has made a reservation on signature of the Civilians Convention to the provisions regarding the death penalty which are quoted above. The effect of this reservation is to provide that the death penalty shall be imposed for the offences mentioned, whether or not such offences were punishable by death under the law of the occupied territory in force before the occupation began. An amendment was submitted at the Geneva Conference, in the sense of this reservation, and was lost by one vote in Plenary Session; it was supported on the grounds that it is absolutely necessary in occupied territory to be able to use the death penalty as a deterrent against serious offences threatening the security of the forces of the Occupying Power and that any country which believes itself to be in danger of occupation in any future war would be likely to abolish the death penalty solely for the purpose of avoiding its application during such occupation.

Section IV of the Civilians Convention consists of regulations for the treatment of internees. It is not proposed to examine these in detail. They constitute a recognition of the view which was put into practice in the recent war by the United Kingdom that the provisions of the Prisoners of War Convention should be applied as far as possible by analogy to civilian internees.[3] In general, the provisions of this section follow very closely those of the Prisoners of War Convention of 1949. Certain differences are due only to the fact that the persons detained are civilians and not members of the armed forces. For example, it is provided (in Art. 82) that 'wherever possible, interned members of the same family shall be housed together in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life'. To avoid repetition it is laid down in Article 126 of this section that the provisions relating to the trial and rights of defence of 'protected persons' in occupied territory shall be applicable to civilian internees in the territory of a belligerent.

V. *Conclusion*

The four new Geneva Conventions are not free from defects and omissions. It is submitted, however, that they constitute a real advance in that field of international law which is concerned with minimizing the effects of war, and that they are in accordance with that recognition of the existence of fundamental human rights which is to be found in the Universal Declaration of Human Rights approved by the General Assembly of the United Nations on 10 December 1948.[4]

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[1] Oppenheim, op. cit., vol. ii, p. 342.

[2] Hall, op. cit., p. 555.

[3] The problem of the civilian internee first came into prominence during the 1914–18 War and engaged the attention of the International Red Cross Committee, notably of Dr. Ferrière who extended the activities of the International Red Cross for the benefit of civilian internees (Werner, op. cit., p. 390).

[4] Cmd. 7776. It is interesting to note, for example, that the principles underlying Art. 10 of

We may recall, in this connexion, the frequently quoted passage in Montesquieu's *Esprit des Lois*: 'Le Droit des gens est naturellement fondé sur le principe, que les diverses nations doivent se faire dans la paix le plus de bien, et dans la guerre le moins de mal qu'il est possible sans nuire à leurs véritables intérêts.'[1] At the Geneva Conference of 1949 there was a constant struggle to strike a balance between those humanitarian considerations which ought to be taken into account by all civilized nations and the legitimate necessities of a state at war. In the case of the Civilians Convention, the necessary adjustments between these two points of view were made more difficult as the result of enemy occupation during the Second World War of several countries represented at the Conference. The recent experiences of the representatives of those countries very naturally made it difficult for them to see the problems of occupied territory from any point of view but that of the victims of occupation. On the other hand, there were also represented at the Conference countries which had not suffered occupation, but had found themselves in the position of an Occupying Power; the delegates representing such countries found it impossible to overlook the necessity for protecting the legitimate interests of the occupying forces and of excluding from the Civilians Convention any provisions which would lay an intolerable and unjustified burden on an Occupying Power, and would thus open the door to disregard of the Convention. That these and other differences of outlook have been overcome and have resulted in the drawing up of Conventions which have now been signed by sixty-one countries, including those Eastern European countries which are at the present time finding it difficult to co-operate with other nations in the field of international affairs, must be regarded as a victory for those principles of justice and humanity which, since the first Geneva Convention of 1864, have characterized the international Conventions designed to alleviate the sufferings of war. Until war has been finally abolished, the necessity for international agreement to minimize its effects and evils must remain. The ideal for which all nations must strive, if they are to avoid annihilation, is set forth in a Resolution annexed to the Final Act of the Geneva Conference which affirms the desirability of 'a friendly settlement of differences through co-operation and understanding between nations' so that 'in the future, Governments may never have to apply these Conventions for the protection of war victims'.

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the Declaration of Human Rights ('Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of . . . any criminal charge against him'), and of Art. 11 (2) ('No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed') are embodied in the Prisoners of War Convention of 1949 and the Civilians Convention of 1949.

[1] Book 1, ch. iii.

THE RIGHT OF ASYLUM

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I. *The competence of states to grant asylum on their territory*

THERE is an undisputed rule of international law to the effect that every state has exclusive control over the individuals on its territory. Two principles follow from that rule: the first recognizes the competence of the state to regulate the admission of aliens at will. That power is usually stressed in connexion with the exclusion or expulsion of friendly aliens, or their admission on certain conditions only.[1] But it also means the reverse, namely that a state is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another state. Secondly, territorial supremacy means that no state is entitled to exercise corporeal control over individuals on the territory of another state,[2] even if these are its nationals, —although no rule of international law prevents a state from assuming jurisdiction, in its courts, for offences committed abroad. Such individuals are safe from persecution unless the state on whose territory they are is prepared to surrender them. Thus it has been recognized in several cases[3] that seizure of individuals on foreign territory with the connivance of official authorities involves the state responsibility of the seizing state, which is bound to return the individual concerned if the state of asylum so demands. A competence to grant asylum thus derives directly from the territorial sovereignty of states.[4]

The practice of states in the matter of extradition supports this view. It is generally recognized that, in the absence of an extradition treaty with the requesting state, there is no legal duty to surrender fugitives.[5] Thus it was stated by Lord Russell in 1862:

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[1] See *United States Foreign Relations Reports*, 1908, pp. 775 ff.; ibid., 1928, vol. i, p. 929; Moore, *Digest of International Law* (1906), vol. iv, p. 151; *Nishimura Ekiu* v. *United States* (142 U.S. 651); *Musgrove* v. *Chun Teeong Toy*, [1891] A.C. 272.

[2] This was stressed by the Legal Adviser of the State Department of the United States in a letter of 18 August 1948 regarding Mme Kasenkina, a Russian schoolmistress who had sought asylum in the United States (*Department of State Bulletin* (1948), pp. 261–2).

[3] The most important of these was a dispute in 1935 between Germany and Switzerland on the kidnapping of Herr Jacob Salomon, a German refugee, from Swiss territory. On this case, which ended in the surrender of the individual concerned to Switzerland before arbitration could take place, and two similar instances in the same year, see Preuss in *American Journal of International Law*, 29 (1935), pp. 502 ff., and ibid., 30 (1936), p. 125. In cases where a refugee is brought to the territory of the pursuing state after being arrested by a private person or by the agents of the state of asylum, it would seem that there is no duty to return the individual concerned to the place of asylum. See *Reports from the Law Officers of the Crown*, 1882, pp. 75–6.

[4] Cf. Heffter, *Das Europäische Völkerrecht der Gegenwart* (8th ed., 1888), paragraph 63.

[5] Grotius held that there was such a duty, but practice has not followed his view.

> 'England, France and the United States have constantly, either by diplomatic acts, or by decisions of their tribunals, expressed the opinion that, upon principles of international law, irrespective of treaty, the surrender of a foreign criminal who has taken refuge within their territory cannot be demanded.'[1]

Similarly, in the United States Secretary of State Webster stressed that

> 'although such extradition is sometimes granted, yet, in the absence of Treaty stipulation, it is always a matter of comity or courtesy. No government is understood to be bound by the positive law of nations to deliver up criminals, fugitives from justice, who have sought an asylum within its limits.'[2]

More recently the position was summed up with clarity by the Supreme Court of the United States in the case of *Factor* v. *Laubenheimer*:

> 'The principles of international law recognise no right to extradition apart from treaty. While a government may, if agreeable to its own constitution and laws, voluntarily exercise the power to surrender a fugitive from justice to the country from which he has fled, and it has been said that it is under a moral duty to do so, the legal right to demand his extradition, and the correlative duty to surrender him to the demanding state exist only when created by treaty.'[3]

The necessity for extradition treaties is a recognition of the competence to grant asylum. Moreover, the conditions of these treaties are usually carefully circumscribed. They thus become, in turn, safeguards of the right of asylum. This has been repeatedly recognized by the German Reichsgericht. In 1899 it declared:

> 'There is no doubt that the provisions of the extradition treaties . . . are concluded less in the interest of the criminal than in that of the right of asylum and the jurisdiction of the treaty states.'[4]

When no treaty obligation is in existence, the surrender of fugitives is at the discretion of the sheltering state. The Canadian Extradition Extension Act of 1889[5] which permits extradition in the absence of a treaty does so only for crimes enumerated in the Schedule to the Act, and with relation to states to which its provisions have been specifically applied by the Governor-General.[6] Moreover some countries do not possess the constitutional power to extradite without treaty. Thus the British Extradition Act of 1870[1] provides in Article 2 that it can only be applied to countries with whom a treaty has been made. The position in the United States is similar. Secretary of State Gresham declared in 1895 that

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[1] Earl Russell on 10 June 1862 (*Fontes Juris Gentium*, ed. by Bruns, Series B, Section I, vol. i, Part 1 (1932), No. 1254).

[2] Moore, op. cit., vol. iv, p. 246.

[3] 290 U.S. 276, at p. 287. See also *U.S.* v. *Rauscher* (119 U.S. 407): 'Prior to these treaties and apart from them it may be stated . . . that there was no well defined obligation on one country to deliver up fugitives to another, and though such delivery was often made it was upon principles of comity, and within the discretion of the government.'

[4] *Entscheidungen des Reichsgerichts in Strafsachen*, 32, p. 425. See also ibid., 35, p. 254, for the view that surrender of a fugitive without the formalities of extradition is tantamount to the renunciation of the right of asylum.

[5] 52 Vict., 3. 36. Its provisions were incorporated in the Revised Statutes of 1906, c. 155, and in R.S. 1927, c. 37.

[6] An American application relying on this Act failed, as the Act had never been applied to the United States (Moore, op. cit., pp. 261–3).

> 'In the absence of Treaty and an Act of Congress authorising it, the President has no authority to cause the arrest and extradition to another country of an alleged criminal found within the jurisdiction of the United States.'[2]

His view has repeatedly been affirmed since.[3] That constitutional inability to extradite means that even common criminals will be sheltered unless Great Britain and the United States are by treaty bound not to give them asylum.[4]

The preceding observations refer to the competence of states to give asylum to all fugitives. In actual fact, 'common' criminals are usually surrendered. On the other hand, the principle of non-extradition of political offenders has been explicitly laid down in treaties[5] and municipal enactments[6] on extradition. To some extent that principle may have its origin in the fact that the examination of a demand for extradition on political grounds would be tantamount to consideration of the internal affairs of a foreign state.[7] The effect of that principle is to grant asylum to political offenders.[8] By enacting these provisions in treaties states have reciprocally recognized a right[9] to give asylum to political refugees. That right has been safeguarded by the principle that 'the nation surrendering is to be the judge of what is, or is not, a political offence'.[10]

It may be mentioned that the competence of states to grant asylum has been recognized in some special treaties on asylum. Thus the Treaty on Political Asylum, signed at Montevideo on 4 August 1939 by six Latin-American states, provided in Article 11:

> 'Asylum granted within the territory of the High Contracting Parties, in conformity

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[1] 33 & 34 Vict., c. 52.

[2] Moore, op. cit., p. 252.

[3] By Secretary of State Olney (ibid., p. 253); by the Supreme Court of the United States in *Terlinden* v. *Ames* (184 U.S. 276); and by Secretary of State Hughes (*United States Foreign Relation Reports*, 1923, vol. ii, p. 705).

[4] Cf. defending Counsel in *Re Castioni*, [1891] 1 Q.B. 149, at p. 153: 'if by common law there was no extradition, then asylum was absolute'.

[5] For a list of such treaty provisions see Fauchille, *Traité de Droit international public*, vol. i (1922), pp. 1011 ff.

[6] E.g. Art. 3, para. 1, of the Extradition Act of 1870, and Art. 21 of the Canadian Extradition Act (R.S. 1927, c. 37).

[7] Other explanations of the development of the principle are the fact that it is difficult to apply to political crimes the usual safeguards of extradition proceedings, such as the requirement of double criminality, and, in recent times, the simple desire to protect bona fide political dissidents.

[8] Cf. the reasoning of the Swiss Federal Court in a case decided in 1908 (*Entscheidungen des Schweizerischen Bundesgerichts*, 34, part I, p. 546).

[9] On the question whether these treaties have created an international duty to grant asylum to political offenders, see below, p. 342.

[10] Earl of Derby to Colonel Hoffman, 4 May 1876 (*British and Foreign State Papers*, vol. lxvii, p. 832).

> with the present treaty, is an inviolable asylum for persons pursued under the conditions described in Article 2. . . .
>
> 'The determination of the causes that induce the asylum appertains to the state which grants it.'[1]

Moreover, states have often recognized the existence of a general right of asylum even while objecting to the exercise of that right in an individual case. Examples of that attitude can be found in the notes of the continental Powers to Great Britain in 1852,[2] in the French Note to Great Britain, dated 20 January 1858, concerning an attempt on the life of the Emperor Napoleon III which had been planned in England,[3] and in a Note from the United States of 1864 regarding the presence in England of subjects of the Confederate states.[4] In 1926, after an attempt on his life by an Italian exile resident in France, Signor Mussolini stated:

> 'I know very well that the right of asylum is a weighty argument, and I myself accord this right . . . but the right of asylum must not be confused with the abuse of it.'[5]

During discussions on the constitution of the International Refugee Organization in the United Nations several Eastern European states, while attempting to limit the right of asylum, have explicitly admitted its existence.[6]

There can thus be no doubt that states are competent to grant asylum. In some circumstances they are under an obligation to limit that power in the interest of other states. Thus, in the first instance, states have entered into conventional agreements to the effect that certain categories of individuals—such as common criminals and war criminals—are not entitled to asylum, but are liable to be surrendered to their country of origin or to the country where they have committed an offence. Secondly, states exercise the powers of exclusion, surveillance, and expulsion of aliens with regard to fugitives whose activities cause their state of origin genuine anxiety. It is controversial whether states consider that they are under a legal obligation to act in such a manner, or whether they merely base their action on grounds of expediency. In any event, these limitations determine the scope of the problem of the right of asylum. It mainly concerns the bona fide political refugee—who may have been guilty of an actual political offence, or who has been persecuted on the ground of his political beliefs, and who, in the country of refuge, does not abuse the hospitality granted him by engaging in activities detrimental to his state of origin. We may now inquire whether such bona fide refugees have any right to the protection of the state of (potential) asylum.

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[1] *American Journal of International Law*, 37 (1943), Official Documents, p. 102. Art. 16 of the Treaty of Montevideo of 1889 is similar in tenor. A suggestion that an article on Asylum should be included in the Declaration on the Rights and Duties of States was rejected by the International Law Commission in May 1949.

[2] *Accounts and Papers laid before Parliament*, vol. liv (1852), pp. 49 ff.

[3] Ibid., vol. lx (1857/8), p. 143 (Cmd. 2305).

[4] Ibid., vol. lxii (1864), p. 137 (Cmd. 3285): 'the toleration of these avowed enemies of the United States whilst known to be carrying on hostile practices within the British realm . . . cannot be regarded as an exercise of the unquestionable right of sheltering exiles'.

[5] *Survey of International Affairs*, 1927, p. 142.

[6] See, e.g., *Official Records of the Economic and Social Council*, First Year, Second Session, p. 543; *Journal of the General Assembly*, Second Part of First Session, p. 794.

II. *The right of individuals to asylum*

International law as currently interpreted does not confer rights on individuals. The practice of states has not admitted a right of individuals to asylum.

1. *A right to asylum in relation to the state of origin*

Courts of the state of origin of fugitives have at times had occasion to inquire whether the latter possess a right of asylum in the state of refuge. The question has arisen, first, in cases where an individual has been extradited for crimes not included in an extradition treaty, or without extradition proceedings. It has been shown above that the state of asylum may waive its right to grant asylum. But individuals have occasionally contended that they, for their part, had a right to asylum—a right which was limited only by existing extradition treaties—and that surrender without their consent infringed that right. In cases of this kind courts have held that surrender does not violate a right of the individual on which he can rely as a bar to prosecution.[1] Thus in 1922 the German Reichsgericht said, with regard to an individual who had been surrendered by Holland without extradition proceedings:

> The absence of extradition proceedings is irrelevant. The extradition Treaty with Holland does not contain any provision which confers upon an accused person who has been handed over without any extradition proceedings the right to invoke the absence of extradition proceedings as a reason preventing prosecution. The fact that the accused succeeded in crossing the frontier does not therefore confer upon him the right to claim impunity.[2]

In 1929 the same Court held that

> Extradition can be granted by the State applied to even in respect of a crime which is not included in the list of crimes for which extradition might be granted. If this is the case, the accused cannot deduce from the extradition Treaty any claim to immunity from criminal prosecution.[3]

Similar views were expressed, *obiter*, by a United States Circuit Court of Appeals in *Chandler* v. *United States*,[4] decided on 3 December 1948:

> 'The right of asylum is that of the State voluntarily to offer asylum, not that of the

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[1] On the attitude of states of refuge in this matter, see below, p. 344.

[2] *Annual Digest*, 1919–20, Case No. 185.

[3] Ibid., 1929–30, Case No. 167; see also ibid., 1935–7, Case No. 165.

[4] 171 F. (2d) 921.

> fugitive to insist upon it. An asylum State might, for reasons of policy, surrender a fugitive political offender—for example, a State might choose to turn over to a war-time ally a traitor who had given aid and comfort to their common enemy—in such a case we think the accused would have no immunity from prosecution in the courts of the demanding State, and we know of no authority indicating the contrary. . . .'

It is thus clear that individuals cannot rely on a right to be surrendered only in pursuance of an extradition treaty. It may be argued that the resulting position is desirable, as extradition serves the purpose of the international repression of crime, and its limits must not be too closely circumscribed. As stated above, the problem of asylum concerns mainly the bona fide political refugee, not the fugitive criminal. But courts, when faced with the question whether individuals who have been irregularly returned from a place of refuge are subject to their jurisdiction, have also denied that the individual can invoke any right of asylum in the place of refuge.

It has been shown above that the seizure of individuals on foreign territory by state officials constitutes an international wrong for which the seizing state is liable to the state of refuge. A conception of international law designed to make that legal rule fully effective would lead to the conclusion that no court of the seizing state can assume jurisdiction over persons so seized,[1] and that, by implication, these individuals have a right to security in asylum. As a rule courts have not taken this view. In *Ker* v. *Illinois*,[2] a case in which appellant had been kidnapped in Peru and brought to the United States, the Supreme Court of the United States held that:

> 'there is no language in the Extradition Treaty with Peru or in any other treaty made by this country on the subject of extradition, which says in terms that a party fleeing from the United States to escape punishment for a crime becomes thereby entitled to an asylum in the country to which he has fled. . . .'

In this case the United States had not been responsible for the original seizure. But the decision has been followed by other courts in cases where the person concerned had been seized by state officials. Thus in the case of *United States* v. *Insull*[3] a United States District Court held that

> 'the defendant could not invoke a right of asylum in the country of refuge, even though his recovery might not have been in conformity with the treaty of extradition with that country. The right of the Hellenic Republic, or Turkey, to give asylum to the defendant is different from the right of the defendant to demand security in that asylum.'

In *Afouneh* v. *Attorney General of Palestine*, decided in 1942, the Supreme Court of Palestine held that

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[1] Cf. the opinion of the Supreme Court of the United States in *Cook* v. *United States*, 288 U.S. 102.

[2] 119 U.S. 436.

[3] *Annual Digest*, 1933–4, Case No. 75. See also *United States* v. *Unverzagt* (1924), 299 Fed. 1015.

> 'where a fugitive is brought back by kidnapping, or by other irregular means, and not under an extradition treaty, he cannot, although an extradition treaty exists between the two countries, set up in answer to the indictment the unlawful manner in which he was brought within the jurisdiction of the court. It belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights.'[1]

In *Chandler* v. *United States*,[2] decided on 3 December 1948 by a United States Circuit Court of Appeals, the Court held that an American citizen who broadcast for the German Government during the Second World War and who was arrested in Germany by American military authorities and brought to the United States, could not rely on the fact that the manner in which he was brought before the Court violated an extradition Treaty.[3] Moreover, in *Ex parte Lopez*[4] a United States District Court held that even the right of Mexico, the country of refuge, was only enforceable by diplomatic action, and that the Court had no jurisdiction to accede to Mexico's demand for the return of the seized person. Occasionally a court has followed sounder principles. In the case of *Jolis*[5] a French Court of first instance held that an arrest effected by French officers on foreign territory could have no legal effect whatsoever and was null and void. But this would seem to be the exception rather than the rule.

Similarly courts have held that they have jurisdiction, and that the individual concerned cannot rely on a right of asylum, in cases where persons have been extradited by mistake and their prosecution involves the breach of an international extradition agreement. Thus in 1926 the German Reichsgericht held that it was not concerned with the fact that the extradited person was being tried for a political offence, although he had been extradited on the mistaken assumption that the offence was a 'common crime'. The Court said:

> 'We are not competent to examine whether the accused was extradited in accordance with the extradition treaty in question. That Treaty does not confer rights upon the extradited person as such.'[6]

The matter discussed is closely connected with the problem of the relationship between international law and municipal law. If treaties are part of the law of the land their provisions should be applied by municipal courts. The point is well illustrated by a decision of the Italian Court of

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[1] *Annual Digest*, 1941–2, Case No. 97.

[2] 171 F. (2d) 921.

[3] The Court doubted whether the Treaty conferred any rights on the individual which he might assert in court. But this may not have been a decisive consideration. The Court inclined to the view that the Extradition Treaty between Germany and the United States on which the defendant relied had not survived the war.

[4] *Annual Digest*, 1933–4, Case No. 76.

[5] Sirey, *Recueil général des lois et des arrêts*, 1934, part ii, p. 105.

[6] *Annual Digest*, 1925–6, Case No. 234. See also ibid., 1929–30, Case No. 167, and ibid., 1931–2, Case No. 164. Extradition treaties in general, it has been held, are not made for the benefit of the individual. See *Entscheidungen des Reichsgerichts in Strafsachen*, 34 (1901), p. 191.

Cassation in the case of *Oberbichler*.[1] The person concerned had been extradited to Italy on the condition that the death penalty should not be imposed. The Court was prepared to assume that Italy had undertaken an international obligation in this respect. It nevertheless held that it could not give effect to that condition, on the ground that

> 'no limitation upon the application of the rule of law, even if derived from international relationships, can be taken into consideration by the judge unless it has been transmuted into a rule of municipal law'.

There is one exception to that attitude of courts. The principle of the identity of extradition and prosecution, usually considered to be a principle of customary international law, and the rule, derived from it, that an individual must be given an opportunity to return to the place of asylum before he can be tried for an offence other than the one for which he has been extradited, is applied by them as an integral part of municipal law.[2] This means that the individual can plead a right of asylum as a bar to prosecution with respect to all matters other than the crime for which he was extradited by the state of asylum. The most interesting example of this practice is provided by the case of *Fiscal* v. *Samper*, decided by the Spanish Supreme Court in 1934. The Court held that:

> '. . . delinquents who take refuge in a foreign country relying on a legislation which promises them protection have acquired a true right, disregard of which would tend to weaken the law of nations and to introduce lack of confidence into international relations.'[3]

The decision is significant, first, because the Court stressed the fact that the extradition treaty had become part of the law of the land and could be invoked by private individuals, and, secondly, because it regarded the principle of the identity of extradition and prosecution as having been established for the benefit of the individual, not of the state of asylum. It must be said, however, that most courts, although they apply that principle when it is invoked by an individual, do not do so out of regard for the latter. This is shown by a decision of the German Reichsgericht of 25 June 1929.[4] The Court held that the principle of the identity of extradition and prosecution could be waived by the two states concerned in an international convention. It would seem, therefore, that the right of asylum which courts recognize as a bar to prosecution is that of the state of refuge, not of the individual. Thus there is no question here of an exception to the rule that courts of the state of origin do not recognize a legal right of the individual to asylum. But the fact that states apply international obligations in their municipal courts means that the individual is permitted to benefit in practice from the willingness of another state to shelter him.

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[1] *Annual Digest*, 1933–4, Case No. 150. See also *In re Manovrati*, ibid., 1935–7, Case No. 175.

[2] For the attitude of French courts see *Annual Digest*, 1938–40, Cases No. 147 and 148; for the attitude of German courts see ibid., 1919–21, Case No. 182, and ibid., 1935–7, Case No. 174; for the attitude of Italian courts see ibid., 1935–7, Case No. 176.

[3] Ibid., 1938–40, Case No. 152.

[4] Ibid., 1929–30, Case No. 168.

2. *A right to asylum in relation to the state of refuge*

(*a*) *General principles of international law.* The cases discussed so far were concerned with the right of the individual to be protected against the persecution of the state from which he has fled. In practice he is given that protection by the mere fact of the territorial supremacy of the state of asylum. However, the main problem of the subject of asylum concerns the relationship between the individual and the state of (potential) refuge. There can be no doubt that the individual has no general 'right' of asylum against that state. This was succinctly stated by the German Reichsgericht in 1900:

> 'The accordance or refusal of asylum is a right of the state to which the fugitive has fled. The fugitive has no claim to it.'[1]

A Resolution of the Swiss Federal Council of 23 February 1921 was equally emphatic:

> 'L'Étranger n'a pas droit à l'asile. L'État a simplement la faculté, en vertu de sa souveraineté, d'admettre sur son territoire un étranger, et il prononce en toute liberté.'[2]

Similarly, a United States District Court held in the recent case of *Ex parte Kurth*[3] that

> 'the constitutional provisions that rights enumerated in the Constitution should not be construed so as to deny others retained by the people, do not give a right of asylum in the United States to political refugees of other countries, such a right being contrary to principles of international law and not having been previously recognized'.

In the Third Committee of the General Assembly of the United Nations in November 1948 Egypt submitted an amendment to the Article of the Declaration of Human Rights which is concerned with the right of asylum. She proposed that there should be a right of asylum 'in accordance with the rules of international law'.[4] This was opposed by Pakistan on the ground that

> 'Since the right to claim asylum was not admitted by the rules of international law to make the exercise of that right subject to such rules as proposed by the Egyptian delegation, would be tantamount to preventing it from coming into existence until international law should have developed sufficiently to include that principle.'[5]

Such exceptions as there are to the rule that individuals have no rights under international law have almost invariably been created by treaty. No international treaty entitles individuals to claim asylum from states. The chief international instrument concerned with the subject of asylum from the point of view of the individual is the Universal Declaration of Human Rights. Article 14 of the Declaration, as adopted by the General Assembly of the United Nations in December 1948, provides:[1]

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[1] *Entscheidungen des Reichsgerichts in Strafsachen*, 33 (1900), p. 99.

[2] Cited by Schlesinger in *Columbia Law Review*, 43 (1943), p. 944.

[3] (1940) 28 F. Suppl. 258; appeal dismissed in *Kurth* v. *Carr*, 106 F. (2d) 1003. See also a statement by Mr. Yepes during the discussion of the Right of Asylum by the International Law Commission. Doc. A/CN. 4/SR. 16, p. 16.

[4] Doc. A/C. 3/264.

[5] Doc. A/C. 3/SR. 121, p. 15.

> 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> 'This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

The Declaration as such confers no legal rights and imposes no legal obligations.[2] The proposed Convention on Human Rights, which would have legal effects, significantly omits all mention of the subject of asylum.[3] But even in the Declaration states were not prepared to accept a formula which in any way implied a right of the individual to asylum. The original draft of Article 14—then Article 12—ran as follows:

> 'Everyone has the right to seek and to be granted, in other countries, asylum from persecution.'[4]

The principle of the right of the individual to be granted asylum was strongly opposed by Mrs. Corbet of the United Kingdom in the Third Committee of the General Assembly on 3 November 1948:

> 'No state could accept the responsibilities imposed by Article 12. The United Kingdom had often had occasion to offer asylum to political refugees . . . but it [had] not done so under any obligation.'[5]

Similarly, Mr. Watt of Australia objected to the original wording on the ground that the Declaration must make no reference to the obligations of states.[6] The delegate of Saudi Arabia spoke to the same effect:

> '. . . every persecuted person should be able to benefit from the right of asylum. . . . That did not mean, however, that everyone had the right to obtain asylum in the country of his choice, although that country might not be prepared to receive him. Such a principle would be a flagrant violation of the sovereignty of the state concerned.'[7]

The meaning of the amended wording proposed by the United Kingdom was explained by Mrs. Corbet as follows:

> 'the right of asylum was the right of every state to offer refuge and to resist all demands

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[1] *United Nations Bulletin*, vol. vi, No. 1 (1 January 1949), p. 7.

[2] *Official Records of the Economic and Social Council*, Sixth Session, Supplement I, pp. 36 and 57.

[3] But see ibid., p. 14: the Human Rights Commission, at its session of December 1947, 'decided to examine at an early opportunity the question of the inclusion of the right of asylum of refugees from persecution in the International Bill of Human Rights or in a special Convention for that purpose'.

[4] Doc. A/C. 3/285, Rev. 1.

[5] Doc. A/C. 3/SR. 121, p. 4.

[6] Ibid., p. 16.

[7] Ibid., p. 6.

for extradition. This was the meaning of the expression "to enjoy asylum" contained in the amendment.'[1]

In other words the refugee, in asylum, is safe from the reclamations of the home state. This already follows from the territorial sovereignty of the state of asylum.[2] Article 14, as it now stands, has justly been described as 'flippant'.[3]

There was opposition to the United Kingdom amendment. The most emphatic objection came from M. Cassin, the delegate of France:

> 'He did not agree with the restrictive conception embodied in the words "to enjoy" in the United Kingdom amendment. The persecuted would need to receive asylum, not merely the right of asylum.'[4]

But the amendment, which, from the point of view of the individual—for whose protection the whole Declaration is intended—makes the right of asylum meaningless,[5] was adopted, thirty states supporting it, one voting against it, and twelve abstaining.[6]

(*b*) *The right of individuals to asylum under the municipal law of individual states.* Some municipal constitutions have recognized a right of individuals to asylum. The Constitutions of several East European Communist states, in practically identical terms, offer the right of asylum to aliens

> 'persecuted for defending the interests of the working people, or for their scientific activities, or for their struggle for national liberation'.[7]

In other words, they offer asylum to persons who actively champion the same interests as the states in question. It is implicitly denied that persons of opposed political views can be entitled to protection. The French Constitution of October 1946 provides in its preamble that

> 'anyone persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic'.[8]

Article 10 of the Italian Constitution of 1947 provides that

> 'any alien debarred in his own country from the effective exercise of democratic liberties

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[1] Doc. A/C. 3/SR. 121, p. 5.

[2] Perhaps courts of the state of origin will now have to allow individuals a right of security in asylum. There could then be no trial of persons removed from the place of asylum by force or by fraud. It has also been suggested that an individual could not be penalized for having recourse to asylum (ibid.). But if the refugee is already in danger in the state of origin this would not give him much protection.

[3] Lauterpacht in this *Year Book*, 25 (1948), p. 374.

[4] A/C. 3/SR. 122, p. 3.

[5] Cf. the comment of the Russian delegate in the Third Committee: 'the amendment tended to reduce to nothing the possibilities of receiving asylum' (A/C. 3/SR. 122, p. 4). See also the remarks of the delegates of Lebanon (A/C. 3/SR. 121, p. 12) and of Pakistan (ibid., p. 14).

[6] Similarly, Art. 27 of the American Declaration of the Essential Rights and Duties of Man, adopted in 1948, confers a 'right' which is, in practice, meaningless: 'Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, *in accordance with the laws of each country* and with international agreements' (italics the writer's).

[7] Constitution of Albania of March 1946, Art. 36; of Byelorussia of 1937, Art. 104; of the Ukraine of 1937, Art. 128; of the Union of Soviet Socialist Republics of December 1936, Art. 129; of Yugoslavia of January 1946, Art. 31.

[8] *Year Book of Human Rights*, 1946.

> guaranteed by the Italian Constitution shall have the right of asylum in the territory of the Republic on conditions laid down by law.'[1]

The constitutions of several Latin American states 'offer the right of asylum to those persecuted for political reasons'.[2] Article 16 of the *Grundgesetz für die Bundesrepublik Deutschland*, adopted by the Bonn Parliament on 18 June 1949, provides that 'persons persecuted for political reasons enjoy the right of asylum'.[3]

These constitutional provisions probably limit the powers of the government with regard to exclusion, surrender of political offenders, and expulsion.[4] In some other countries these powers are not exercised against refugees. This constitutes an important mitigation of the position of the individual in the matter of asylum. But municipal remedies are not wholly satisfactory. States are free to alter their constitution at will. They naturally consider the interests of their nationals to be more important than those of alien refugees. The rights of the individual refugee are not safeguarded unless it can be shown that the practice of states in the matter of the admission, extradition, and expulsion of refugees has recognized the existence of a right to asylum on the part of the latter with such consistency that we can begin to speak of a 'general principle of law recognized by civilized states' which the statute of the International Court of Justice declares to be a source of international law.[5]

(*c*) *The treatment of refugees in the practice of states.* (i) *The right of admission.* In most states the entry of aliens is now regulated by means of legislative enactments.[6] This amounts, in effect, to a negation of a right to admission on the part of individuals. Thus it was held by a United States Court in *Ex parte Kurth*[7] that

> 'even if prior to enactment of the restrictive immigration statute a right of asylum in the United States for political refugees existed, the enactment of the statute abolished that right'.

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[1] *Year Book of Human Rights*, 1947.

[2] Constitution of Cuba of July 1940, Art. 31; of Guatemala of March 1945, Art. 26; of Haiti of November 1946, Art. 30; Law of Ecuador on Aliens of February 1938, Art. 3.

[3] Matz, *Grundgesetz für die Bundesrepublik Deutschland* (1949), p. 37.

[4] Cf. Gordon in *Year Book of Human Rights*, 1946, p. 113. This may not be true of Art. 16 of the new German 'Basic Law'. The context suggests that 'Asylrecht' is there used synonymously with 'non-extradition' only.

[5] If a principle of asylum can be shown to have crystallized into a customary rule of international law, the question of its enforcement becomes relevant, bearing in mind the virtual procedura, incapacity of individuals in international law. This subject is dealt with below, p. 352.

[6] Occasionally a country excludes even its own nationals. Under the Canadian Immigration Act (R.S. 1927, c. 93) a naturalized Canadian who has lost his Canadian domicil by one year's absence may be excluded, although he remains a naturalized British subject (*Rex* v. *Smith ex rel. Soudas* (1939), 3 D.L.R. 189). Most Dominions exclude British subjects domiciled in another part of the Commonwealth if these are otherwise liable to exclusion by virtue of their immigration laws. See *The King* v. *Singh* (1948), New Zealand Law Reports, p. 212; and *De Marigny* v. *Langlais* (1948), Criminal Reports, Canada, vol. v, p. 256.

[7] (1940), 28 F. Supp. 258; appeal dismissed in *Kurth* v. *Carr*, 106 F. (2d) 1003.

There can be no doubt that international law permits every state to close its territory to aliens, or to admit them only on conditions. As a corollary, it does not give aliens a right to enter the territory of a foreign state.[1] This view was put forward by the United Kingdom delegate in the Third Committee of the General Assembly of the United Nations during the discussion on Article 12—now Article 14—of the Universal Declaration of Human Rights.[2] In the decision of the Judicial Committee of the Privy Council in *Musgrove* v. *Chun Teeong Toy*[3] it was held that, quite apart from the existence of a constitutional power of exclusion, the alien had no right, under international law or municipal law, to claim admission:

> 'As to the plaintiff's right to maintain the action. He can do so only if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right.'

However, the application of immigration laws has often been waived in the case of political refugees. The Aliens Act of 1905, the first Act to limit entry into the United Kingdom, explicitly exempted political and religious refugees from the main excluding provisions.[4] The Aliens Restriction Act of 1914 had no such exempting clauses, but the Attorney-General stated in the House of Commons that the Government had no intention of enforcing the Act against political refugees.[5] Similarly, the Act of 1917 which contains the 'qualitative tests' of the United States Immigration Laws exempted religious refugees from the literacy test.[6] Moreover, in 1936 Under-Secretary of State Welles stated American policy on the subject to be as follows:

> 'It is the traditional policy of the Government of the United States to grant refuge in its territory to persons whose lives are believed to be in jeopardy as a result of their political activities in a foreign country. Such persons applying for admission to the United States as so-called political refugees are customarily admitted for a reasonable period under a liberal interpretation of the Immigration Laws, provided they can establish to the satisfaction of the competent authorities that their personal safety is

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[1] See *Poll* v. *Lord Advocate* (1897), 35 Sc. L.R. 637; *Nishimura Ekiu* v. *United States*, 142 U.S. 681; *Fong Yue Tung* v. *U.S.*, 149 U.S. 698; *United States ex rel. Polymeris* v. *Trudell*, 284 U.S. 279; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422. When the last case was before a lower Court it was held: 'Entry into the United States and continued residence therein afterwards is not the natural or inalienable right of an alien, but a privilege enjoyed by sufferance of the United States' (62 F. (2d) 808).

[2] Thus Mrs. Corbet stressed that 'no foreigner could claim the right of entry into any state unless that right was granted by treaty': Doc. A/C. 3/SR. 121, p. 5.

[3] [1891] A.C. 272. See also the South African case of *Raner* v. *Colonial Secretary* (1904), 21 S.C. 143.

[4] 5 Edw. VII, c. 13. By Section I, para. 3, refugees were exempted from exclusion owing to poverty. An order of 9 March 1906 provided that, if it was uncertain whether individuals were political refugees, persons coming from politically disturbed countries should be given the benefit of the doubt.

[5] See *Rex* v. *Home Secretary, ex parte Duc de Château Thierry* (1917), 116 L.T.R. 226.

[6] See *Tod* v. *Waldman*, 266 U.S. 113. Political refugees are also exempted from bringing official documents of their state of origin if it is impossible for them to obtain these.

actually threatened and that the offences in which they may have been involved are not such as would render them inadmissible under the law.'[1]

The French decree 'sur la police des étrangers' of 2 May 1938 provides in Article 2:

'. . . les réfugiés politiques qui auront, à leur entrée en France, au premier poste frontière, revendiqué cette qualité dans les formes et conditions qui seront déterminées, feront l'objet d'une enquête administrative sur la vue de laquelle le ministre de l'intérieur statuera.'[2]

This policy has been continued since the Second World War. Speaking for the Government in the House of Lords on 23 June 1948,[3] Lord Henderson stated:

> 'No case has ever been brought to our attention of any political refugee being denied the right of asylum in either of our zones [of occupation in Germany and Austria]. And I want to say, emphatically, that we will never turn back or deport a political refugee.'

Both Great Britain and the United States have admitted leading political dissidents from the Eastern European states without requiring the usual formalities.[4]

At the same time these exemptions do not go very far. In the United States refugees are only exempted from minor provisions of the Act of 1917. In 1934 Assistant Secretary of State Carr stated emphatically that

'there is no authority under the law for a consular officer when receiving an application for an immigration visa to disregard the public charge provision of Section 3 of the Act of February 5, 1917 merely because the applicant claims to be a political or religious refugee'.[5]

Moreover, while it is the policy of the United States, as stated by Under-Secretary of State Welles, to admit individual political refugees, quantitative restrictions on the entry of aliens have never been waived. This means that the refugee who has been persecuted in his country on the ground of race, religion, or political belief, and who forms part of a large group, cannot find preferential admission in the same way as the political offender or fugitive politician who comes as an isolated individual. Thus, in reply to an inquiry by the French Ambassador on the subject of German refugees, Secretary of State Cordell Hull stated in December 1940 that 'no country should be asked or expected to receive a greater number of immigrants than is permitted by prevailing practice and existing laws'.[1] Similarly, the special Displaced Persons Act of 25 June 1948, apart from its other failings, charged the 200,000 displaced persons who are to be admitted under its terms towards the immigration quotas, which, in President Truman's words, 'will become mortgaged for years to come'.[2]

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[1] Hackworth, *Digest of International Law*, vol. iii (1942), p. 132. An example of this policy was given in 1914 when, after some outrages against Chinese inhabitants in Mexico, the Secretary of State wrote to the representative there that the regulations for the admission of Chinese had not been modified, but that 'whenever it becomes necessary in the interest of humanity and to save lives of refugees to give them temporary asylum, that course is being followed' (*United States Foreign Relation Reports*, 1914, p. 900; see also ibid., 1920, vol. ii, pp. 141–2. Entry of Chinese into the United States was, as a rule, completely prohibited).

[2] Sirey, *Recueil général des lois et des arrêts*, 1938, p. 791. Only persons entering after the enactment of that provision could benefit therefron. See the *Gahlen* case, decided by the Court of Cassation on 10 March 1939 (*Dalloz hebd.*, 1939, p. 276), where it was held that a refugee already illegally in the country, and served with an order of *refoulement*, could not invoke that provision.

[3] Hansard, *Parliamentary Debates*, 5th series, House of Lords, vol. 156, col. 1179. See also *The Times* newspaper, 24 December 1949, p. 4, on East German Refugees.

[4] *The Times* newspaper, 29 December 1947, p. 4; ibid., 7 May 1948, p. 4; ibid., 25 September 1948, p. 3; ibid., 28 April 1949, p. 3; ibid., 23 August 1949, p. 3; the *Observer* newspaper, 23 November 1947.

[5] Hackworth, op. cit., vol. iii (1942), p. 736.

In the United Kingdom no special legislative exemptions have existed since 1914. In 1925 the Home Secretary, Sir William Joynson Hicks, denied that persons were refused admission on the ground that they were political fugitives, but admitted that political refugees were excluded if 'undesirable in other respects'.[3] On 25 July 1933 Lord Lucan promised in the House of Lords that His Majesty's Government would give sympathetic consideration to all applications from persons who were suffering oppression in Germany. Large numbers were, in fact, admitted. Similarly, large numbers of refugees and displaced persons have been admitted since the war. But it would appear that after the Second World War refugees have not been admitted as such, but only as 'European Volunteer Workers'; in other words, as immigrants fitting into the requirements of the economic programme.[4]

States have not accepted treaty obligations to admit refugees. The only exception is the Convention of 1933 on the Legal Status of Refugees, signed by eight states, which provides in Article 3, paragraph 2, that

> 'each contracting party undertakes in any case not to refuse entry to refugees at the frontiers of their country of origin'.

Great Britain made a reservation against that clause. Similarly, Great Britain informed the Intergovernmental Advisory Committee on Refugees that 'His Majesty's Government must reserve the right to refuse admission to the United Kingdom to any alien, whether or not he comes within the category of stateless refugees'.[1] The London Agreement of 15 October 1946 on the adoption of a travel document for refugees[2] lays down in Article 16 that

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[1] Hackworth, op. cit., vol. iii (1942), p. 735.

[2] See President Truman's statement on the Act in *Department of State Bulletin*, vol. 19, no. 470, p. 21. This Act is also a good illustration of the fact that states, even while making special provision for refugees, are free to define those eligible to be treated as such. The Act discriminates against political and religious refugees on grounds of nationality, religion, and occupation. A proposal to amend it in this respect was introduced into the House of Representatives early in 1949. It provides that, within the total fixed by the Act, 15,000 refugees are to be admitted who are exempt from its restrictions (*Department of State Bulletin*, vol. 20, pp. 685–6).

[3] Hansard, *Parliamentary Debates*, House of Commons, 5th series, vol. 110, col. 310.

[4] Ibid., vol. 460, col. 333. In an oral answer given on 20 January 1949 Mr. Isaacs, Minister of Labour, stated: 'We posted notices in displaced persons camps on the Continent asking if anybody was ready to volunteer to come here to work. Only those who said they were prepared to accept agricultural or such other work as was offered them were brought here. This man [who had been prosecuted for refusing to do agricultural work] volunteered to come here to work; he did not come here as a refugee.' See also p. 10 of the Summary Report of the Gwatt Conference on Refugee Specialists, held under the auspices of P.C.I.R.O. in April 1948 (Doc. PC/RT/29).

> '. . . the present provisions in no way affect the laws and regulations governing the conditions of admission to, transit through, residence and establishment in, and departure from, the territories to which the present agreement applies.'[3]

It is clear that despite some special provisions in their favour, no customary rule granting refugees a right to admission has developed from the practice of states. The interest of the receiving country is always placed in the foreground. The matter was summed up by Home Secretary Clynes during a discussion in the House of Commons, on 18 July 1929, on the exclusion of Leon Trotsky, a political refugee: 'No alien has the right to claim admission to this country if it would be contrary to the interests of the country to receive him.'[4]

(ii) *Non-extradition of political offenders.* It has been shown that most extradition treaties and constitutional enactments on extradition explicitly exempt political offenders from extradition. But it is controversial whether these provisions can be said to have created an international rule prohibiting the surrender of political fugitives. The authors of the Draft Convention on Extradition prepared by the Harvard Law School drew up an article on the subject which is couched in permissive form: 'a requested state may decline to extradite a person claimed . . . .' They admitted that most treaties and municipal enactments use a mandatory form. But they considered that form unsuitable to a multilateral convention:

> 'There is no reason why a State should be precluded from surrendering, if it so chooses, a person sought for a political offence. It may well be that some States, because

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[1] *Official Journal of the League of Nations*, 1934, p. 373.

[2] Cmd. 7033, *Treaty Series*, No. 3 (1947).

[3] A provision in the Draft Convention relating to the Status of Refugees submitted by the Secretary-General of the United Nations to the *Ad Hoc* Committee on Statelessness and Related Problems (Doc. E/AC. 32/2) would have imposed a moral duty upon states to admit refugees (Art. 3). It provided:

> 'In pursuance of Article 14 of the Universal Declaration of Human Rights the High Contracting Parties shall give favourable consideration to the position of refugees seeking asylum from persecution or the threat of persecution on account of their race, religion, nationality or political opinions.
>
> 'The High Contracting Parties shall to the fullest possible extent relieve the burden assumed by initial reception countries which have afforded asylum to persons to whom paragraph 1 refers. They shall do so, *inter alia*, by agreeing to receive a certain number of refugees in their territory.'

That provision was rejected by the *Ad Hoc* Committee in January 1950.

[4] Hansard, *Parliamentary Debates*, 5th series, House of Commons, vol. 230, col. 603. See also Moore, op. cit., vol. iv, p. 70, on the case of Mr. Mann in 1852. And see Schindler, *Die Fremdenausweisung aus politischen Gründen nach schweizerischem Bundesstaatsrecht* (1930), p. 26.

> of close association or because of the close similarity of their political institutions, would find the extradition of political offenders desirable.'[1]

This view was supported by the German Reichsgericht in a decision of March 1926:

> 'There is no generally recognised rule of international law holding that extradition because of a political offence is never permissible whatever be the view point of the state from which extradition is requested, and that extradition contrary thereto is without legal effect.'[2]

More recently the extradition from France to Belgium of persons who collaborated with the German occupant has been justified by reference to the argument that this is a case calling for co-operation between democratic countries for the repression of an offence which menaces them all equally. 'The usual motives which prevent extradition of political offenders do not apply here. There is a community of conviction and of interest, and there is no likelihood that international relations will be envenomed.'[3] This argument has been criticized by Professor Donnedieu de Vabres.[4] He points out that international relations may easily be adversely affected by discrimination in this respect between different countries, particularly in view of the fact that there is no longer a community of conviction between the Allies of 1944.

On the other hand, Professor Lauterpacht raises the question whether the almost universal adoption of the principle of the non-extradition of political offenders has not made it one of those 'general principles of law recognized by civilized states' which Article 38 of the Statute of the Permanent Court of International Justice has elevated to the authority of a source of international law.[5] The view that states are not free to decide on the extradition of political offenders was also put forward by the Delegate of Panama in the Special Committee on Refugees and Displaced Persons. He said:

> 'I think that the problem of refugees does not only concern two countries—the country of origin and the country of refuge, but that it involves the responsibility of all countries.
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> 'There is one example which I should like to cite:
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> 'It concerns the Vichy Government and the Spanish Government. A bilateral agreement was signed between these two countries, and that agreement was solely concerned with two eminent Spaniards. One was M. Companys, the President of Catalonia: he was to be sent back to Spain for the sole purpose of being killed there. . . . I think that problem concerns all countries. It is an international problem.'[6]

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[1] *Harvard Research in International Law, Extradition* (1935), p. 110.

[2] *Entscheidungen des Reichsgerichts in Strafsachen*, 60 (1926), p. 202.

[3] *Revue critique de droit international privé*, 36 (1947), pp. 438–44. (See also *Chandler* v. *U.S.* (1948), 171 F. (2d) 921, quoted above, p. 331.)

[4] Ibid.

[5] In this *Year Book*, 21 (1944), p. 88.

[6] Doc. E/Ref./I, p. 47.

It may be that the principle of the non-extradition of political offenders has become an international rule of law. The question then arises whether recent infringements of that principle with regard to the surrender of 'quislings and traitors'[1] have made that rule obsolete. Probably they have not done so. For states have been anxious to stress that their obligations in this respect do not compel the extradition of political refugees. In the House of Lords, on 23 June 1948, Lord Henderson stated that Britain was under no obligation to deliver up 'merely political refugees'.[2] The official view of the French Government was put forward in a Note to the Russian Ambassador, dated 4 June 1947. It stated:

> 'Les crimes d'intelligence avec l'ennemi étant sanctionnés en droit français par des principes du droit commun, un individu accusé de ce crime doit être considéré comme criminel de droit commun, et s'il est réclamé par un Gouvernement étranger faire l'objet de la procédure judiciaire de l'extradition.'[3]

Similarly, in several recent cases in which the Court of Appeal of Paris sanctioned the surrender of 'traitors' to Belgium and Luxembourg, the Court stressed that crimes against the external safety of the state are no longer regarded in France as political offences.[4] The decisions have been criticized on the ground that their reasoning is unsound. But this does not affect the validity of the contention here put forward. The eagerness of states to justify their action implies that they consider the principle of the non-extradition of political offenders to be a rule of law binding upon them.

(iii) *Extradition apart from treaty.*[5] The laws on extradition of Great Britain and the United States do not permit surrender in the absence of an extradition treaty.[6] Accordingly, to that extent, under the municipal law of those countries individuals enjoy asylum. But the municipal law of most states permits extradition even in the absence of treaty.[7] Thus on 5 December 1947 the Court of Appeal of Paris held in the case of *Colman* that an individual cannot rely on the fact that the crime for which his extradition was sought was not included in an extradition treaty. The Court said:

> 'The offender who is not a party to the Convention cannot rely on a treaty which was

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[1] See the present writer's note in this *Year Book*, 25 (1948), p. 382.

[2] Hansard, *Parliamentary Debates*, House of Lords, vol. 156, col. 1177.

[3] *La Documentation française.* Notes documentaires et études, No. 695 (14 August 1947).

[4] See case of *Kauffmann*, *Dalloz hebd.*, 1945, *Jurisprudence*, p. 122; case of *Trivier*, ibid., 1947, *Jurisprudence*, p. 468; case of *Bulterys*, *Chronique bimensuelle du Recueil Sirey*, 8 June 1947, p. 44. And see, in particular, the case of *Colman*, *Revue critique de droit international privé*, 36 (1947), pp. 435–8.

[5] On the view of the requesting state on this matter see above, p. 331.

[6] See above, pp. 328, 329.

[7] Art. 1 of the Swiss Extradition Law of 22 January 1892; Art. 1 of the Swedish Extradition Law of 4 June 1913; German Extradition Law of December 1929—all in *Harvard Research in International Law, Extradition* (1935), pp. 414–28.

concluded, not in his interest, but in the interests of the contracting powers and their sovereignty. He has no right not to be surrendered for facts which were not provided for, at the time of the consummation of the offence, by the Franco-Belgian Convention to which he is not a party, as long as both French and Belgian law render criminal and punish the offences at the time when they were committed.'[1]

Here, therefore, it is not easy to speak of a principle of law generally recognized by states. Moreover, even in Great Britain it is not considered that the individual has a right under international law to be maintained in asylum in the absence of an extradition treaty. Thus the Lord Chancellor, Lord Simon, stated in the House of Lords on 7 October 1942:

> 'There is not, as many people suppose, any private right, recognised in international law, called the right of asylum. That is to say the fugitive—the criminal who manages to get over the border into some other country—is not thereby entitled to claim to stay there. . . . It is perfectly competent for the country which receives the criminal, whether there is an extradition treaty or not, if that country thinks it will be fulfilling its duty to the world, or if its conception of public policy requires and justifies it, to hand the criminal over.'[2]

(iv) *The powers of expulsion and of 'refoulement'*.[3] There can be no doubt that by international law every sovereign state has the power to expel[4] unwanted aliens.[5] Moreover, most municipal constitutions now confer on the executive a power of expulsion. As a rule the executive is the sole judge of the expediency of the exercise of this power.[6] Courts can only interfere if the executive has abused its discretion[1] or has otherwise acted illegally.[2] It follows that aliens have no right to be continued in asylum.[3]

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[1] *Revue critique de droit international privé*, 36 (1947), pp. 435–8. But see, for a criticism of these arguments, Donnedieu de Vabres (ibid., pp. 438–44), who contends that in the absence of treaty provision the French Extradition Law of 1927 applies, and that that law was intended to strengthen the rights of the individual.

[2] Hansard, *Parliamentary Debates*, 5th series, House of Lords, vol. 124, col. 582.

[3] The power of *refoulement* may conveniently be dealt with here. It can best be described as expulsion on the ground of illegitimate entry. It should be pointed out, however, that there is a technical distinction between expulsion and *refoulement*, as well as the practical distinction that the latter applies only to persons who have newly arrived in the country. Expulsion is an administrative measure to which sanctions attach; *refoulement* is a police measure the infraction of which is not punishable, but which may lead to an order of expulsion if it is disobeyed.

[4] See *Reports from the Law Officers of the Crown*, 1898, pp. 92 and 95–7; *Vaaro* v. *The King*, [1938] 1 D.L.R. 359; *Attorney-General* v. *Cain*, [1906] A.C. 542; Hackworth, op. cit., vol. iii (1942), pp. 690–705; *United States Foreign Relation Reports*, 1895, vol. ii, pp. 1801–2; ibid., 1908, pp. 775 ff.; *Fong Yue Tung* v. *U.S.*, 149 U.S. 689; Havana Convention on Status of Aliens, 1928.

[5] It would appear that international law does not authorize the expulsion of nationals, at any rate unless the state to which they are being deported has explicitly agreed to receive them. In the case of *Co-operative Committee on Japanese Canadians* v. *Attorney-General of Canada*, [1947] A.C. 87, it was argued before the Judicial Committee of the Privy Council that the deportation from Canada of persons of Japanese race but of British nationality was contrary to international law. The Judicial Committee did not deny that contention. But it held that the Act from which the authority to deport was derived was a War Measures Act which cannot be construed with reference to 'the accepted rules of international law applicable in time of peace'.

[6] See *U.S. ex rel. Hudak* v. *Uhl*, 20 F. Supp. 928; *Rex* v. *Home Secretary ex parte Duc de Château Thierry*, 116 L.T.R. 226; *Kondiantz* case (1938), *Dalloz hebd.*, 1939, p. 3; *Mavrommatis* v. *Public Prosecutor* (1934), ibid., 1935, p. 7. In Switzerland no legal appeal against federal expulsion is possible (see Schindler, op. cit., p. 929). On the expulsion of enemy aliens see *Netz* v. *Chuter Ede*, [1946] 1 All E.R. 628; *Hirsch* v. *Somervell*, [1946] 2 All E.R. 27.

Again, however, exceptions have been made in favour of political refugees. Here, too, the question arises whether these are creating a right in favour of political refugees. As a rule refugees are not expelled to countries where they would be persecuted. In England the Court of Criminal Appeal, in the early case of *Re Zausmer*,[4] refrained from recommending expulsion on the ground that the defendant, if sent back to Russia, would be punished for desertion. Since the enactment of the Aliens Restriction Act of 1914 and the Aliens Restriction (Amendment) Act of 1919 the Home Secretary has been responsible for the expulsion of aliens. In *Rex* v. *Home Secretary ex parte Duc de Château Thierry*[5] the Court of Appeal held that the discretion of the Home Secretary was absolute:

> 'Assuming, therefore, that the respondent proved that he was a political refugee and unfit for military service, such facts would not affect the validity of the order, but would only be matters to be considered by the Secretary of State as affecting the exercise of his discretion.'[6]

As the Attorney-General had stated in 1914 that the Government had no intention of enforcing the Aliens Restriction Act against political refugees, it was assumed that such considerations would be taken into account. This is still the policy of the Home Office. In 1949 in the House of Commons the Home Secretary stated that he could not give a general undertaking not to deport opponents of the Franco régime to Spain. But he added:

> 'I would, of course, carefully consider any information of the nature indicated by Mr. Driberg. If any alien is found in this country engaged in robbery in the company of armed persons I should feel bound to deport him. I do have regard, however, to what is likely to happen to a person because of his political or religious beliefs in the country to which he is returning. . . .
>
> 'The only place to which I can legally deport a person is his country of origin, but I try to help these people as far as I can by allowing them to get out under their own power.'[7]

This consideration for political refugees is purely one of policy. But it might be inferred from the judgments in *Rex* v. *Governor of Brixton Prison*

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[1] As in the United States and Canada. See, e.g., *De Marigny* v. *Langlais* (1948), 5 Criminal Reports, Canada, p. 256 at p. 261.

[2] See the French case *In re Morphy*, Dalloz, *Recueil périodique et critique de jurisprudence*, 1885, Part 3, p. 9.

[3] Cf. the Treaty of Montevideo on Political Asylum and Refuge, signed on 4 August 1939. Art. 11 provides that there is no obligation to keep refugees indefinitely.

[4] (1911), 7 Crim. App. Rep. 41.

[5] (1917), 116 L.T.R. 226.

[6] The Court added that, although the Home Secretary had no power to send an alien to a particular country, he could place him on a ship which would inevitably take him to its final destination. See to the same effect *Papadimitriou* v. *Inspector General of Police and Prisons* (1944), 11 P.L.R. 431.

[7] *Weekly Hansard*, No. 127 (13–19 May 1949), cols. 590–2.

ex parte Sarno[1] that the courts would interfere if there were an apparent misuse of the power of expulsion 'to enforce the return of a real, genuine political refugee to the country of his origin'. Similar views were expressed by Lords Justice Pickford and Warrington in *Rex* v. *Superintendent of Chiswick Police Station ex parte Sacksteder.*[2]

The position in the United States is similar. In strict law the action of the Secretary of Labor, who is responsible for the deportation of aliens, cannot be reviewed by the courts unless he acted on insufficient evidence, or was guilty of an abuse of discretion. This was pointed out by the Court in the case of *United States ex rel. Hudak* v. *Uhl:*[3]

> 'The deportation of aliens is not a subject for review by the Court, unless, perhaps, where it is made clear that deportation to the country named in the order would almost certainly mean death to the alien guilty only of political offences, and even then interference could only be justified upon the ground that the Secretary of Labor was guilty of such gross abuse of discretion as to raise a question of law.'

The Court found that there was such abuse of discretion in *Re Burgoa*,[4] where an order of deportation had been issued against a Spanish Republican refugee although the latter had made arrangements for voluntary departure. In several other instances the courts have been unable to give relief to political refugees on this ground.[5] But in a number of cases courts have given the impression that they consider that genuine political refugees should not be deported to the persecuting country. In two cases it was held that deportation of Jews to countries threatened or occupied by Nazi Germany would be 'inhuman punishment'.[6] On some other occasions courts, while stating that the immigration laws do not recognize the concept of asylum, have been careful to add that there was no evidence that the destination of those deported would be unsafe for them.[7] Apparently, had the court found evidence of genuine fear of persecution, it might have acted differently. Certainly the political department has given consideration to the plight of political refugees. The present policy of the Immigration and Naturalization Service has been officially explained as follows:[8]

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[1] [1916] 2 K.B. 742.

[2] [1918] 1 K.B. 78.

[3] (1937), *Annual Digest*, 1935–7, Case No. 161.

[4] (1946), cited in *Columbia Law Review*, 47 (1947), pp. 652–9, n. 44.

[5] See *U.S. ex rel. Fortmueller* v. *Commissioner of Immigration* (1936), 14 F. Supp. 484; *In re Normano* (1934), 7 F. Supp. 329; *Ex parte Kurth* (1939), 28 F. Supp. 258; *Soewapadji* v. *Wixon* (1946), 157 F. (2d) 28.

[6] *U.S. ex rel. Weinberg* v. *Schlotfeld* (1938), 26 F. Supp. 283; and *U.S. ex rel. Boraca* v. *Schlotfeld* (1940), 109 F. (2d) 108. In the second case the deportation order was held invalid on other grounds. The first decision was disapproved in *Soewapadji* v. *Wixon, supra.*

[7] *U. S. ex rel. von Kleczkowski* v. *Watkins* (1947), 71 F. Supp. 429; *U.S. ex rel. Martinez* v. *Longo*, 66 F. Supp. 587.

[8] See *Columbia Law Review*, 47 (1947), p. 654. See also *United States Foreign Relation Reports*, 1929, vol. iii, p. 388, on the treatment of some Mexican rebels who were declared inadmissible by a Board of Special Inquiry set up under the Immigration Statutes, but were not sent back

> 'Persons found to be illegally in the United States . . . who satisfactorily establish that they are political refugees are given every opportunity by this Service to depart from the United States and adjust their immigration status, if they desire permanent residence in this country, or to effect departure from the United States to some other country before resort is had to the institution of deportation proceedings.'

In France refugees are not, as a rule, deported to their country of origin.[1] The position in Holland appears to be similar.[2] The general impression emerges that, as a matter of policy, refugees are not sent back to their home state. That does not mean that they have a right, enforceable by action, to prevent such return.

In some countries, or with regard to certain refugees, there are legal provisions on the subject. A Swedish law of 4 June 1937 provides that

> 'an alien who has been refused a residence permit, or is threatened with deportation can have his claim to be regarded as a refugee officially reconsidered. . . . If the decision to deport him is upheld the alien cannot be deported to a country whence he has fled for political reasons, or to a country which may deport him to his country of origin.'[3]

The provisional arrangement of 1936 concerning the status of refugees coming from Germany, signed by seven states, provided in Article 7 that even if expulsion were resorted to these refugees were on no account to be sent back to the territory of the Reich.[4] The Treaty of Montevideo of 1939, binding on five states, provides in Article 12 that discontinuance of the benefits of asylum does not imply authorization to place a refugee in the territory of the pursuing state. But such binding legal provisions are the exception rather than the rule.

In many cases, moreover, states reserve the right to expel refugees to states other than the country of origin. In the Brazilian case, *In re Esposito*,[5] an order for the expulsion of an Italian anti-fascist was upheld, although the court granted habeas corpus 'insofar as to leave him free to go where he desires when once outside the boundaries of Brazil'. A United States District Court stated in *United States ex rel. Hudak* v. *Uhl*[6] that in cases in which deportation of an alien to the country from which he may have fled would mean his execution, 'the United States has vested the Immigration Department with discretion to deport the alien to some other country

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to Mexico as long as this implied danger to their lives. These exemptions apparently only apply to cases of deportation on the ground of unlawful entry (*refoulement*), not to deportation on the ground of criminal behaviour.

[1] In December 1948 General Fernandez, a Spanish Republican leader, was banished to Corsica instead of being expelled, as the French authorities did not wish to send him to Spain: *The Times* newspaper, 24 December 1948, p. 3.

[2] See a Circular of the Ministry of Justice of 30 May 1934 regarding deportation of refugees from Germany.

[3] Nathan-Chapotot, *Les Nations unies et les réfugiés* (1949), p. 60, n. 4. See also Art. 31 of the Cuban Constitution of 1940, and Art. 26 of the Constitution of Guatemala of 1945.

[4] Text in Hudson, *International Legislation*, vol. vi, p. 376.

[5] *Annual Digest*, 1933–4, Case No. 138.

[6] 20 F. Supp. 928.

which will receive him'.[1] In *United States ex rel. Fortmueller* v. *Commissioner of Immigration*[2] the Court held that the privilege given in the deportation warrant of 'going to any country of his choice' obviated the necessity of discussing the dangers of relator's return to his native land. Similarly, in England the Home Secretary stated in the House of Commons on 19 May 1949:[3]

> 'The only place to which I can legally deport a person is his country of origin, but I try to help refugees as far as I can by allowing them to get out under their own power.'

Thus political refugees are not secure in the place of asylum.

This is of particular importance in the case of refugees who have been denationalized by their state of origin. For stateless persons find it difficult to gain admission anywhere. Some states do not expel stateless persons.[4] In England the Court of Criminal Appeal seems to have assumed in the case of *Rex* v. *Goldfarb*[5] that they cannot be deported. The British policy was set out more explicitly in a communication to the Intergovernmental Advisory Commission on Refugees:

> 'His Majesty's Government observe the principle that an alien should not be deported except to the country of which he is a national. Accordingly it is not the practice to deport stateless aliens resident in the United Kingdom.'[6]

In the United States a District Court decided on 12 May 1948, in the case of *Staniszewski* v. *Watkins*, that petitioner, a stateless person, must be released on habeas corpus as it was impossible to deport him. In Belgium it has been recognized that stateless persons cannot be forcibly deported. It was held in the case of *Miedzinska*, decided on 11 January 1935, that accused could not be punished for infringing an expulsion order as it had not been proved that the country to which she had been expelled would receive her. On the other hand, in France stateless persons can, as a matter of law, be expelled. This was laid down in the case of *Krichel*, decided by the Conseil d'État on 16 May 1924.[7] Refugees who have been unable to comply with a deportation order may plead *force majeure*, but courts have in many cases required such strict proof of the inability of refugees to gain admission elsewhere that stateless persons have been exposed to the full rigours of the procedure of expulsion.[8] Article 11 of the French decree of

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[1] It appears that the refugee cannot object to being sent to a country on the ground that the laws there in force would permit his expulsion to his state of origin. See *Glikas* v. *Tomlinson* (1943), 49 F. Supp. 104.

[2] 14 F. Supp. 484.

[3] *Weekly Hansard*, vol. 127 (13–19 May 1949), col. 592.

[4] Trachtenberg includes amongst these Albania, Australia, Canada, Hungary, India, Latvia, Nicaragua, Norway, Roumania (see *Revue de droit international*, 3rd series, 17 (1936), pp. 557 ff.).

[5] [1936] 1 A.E.R. 169.

[6] *Official Journal of the League of Nations*, 1934, p. 373.

[7] *Clunet, Journal du droit international*, 52 (1925), p. 709.

[8] See the decision of the Court of Cassation of 8 February 1936 in the *Rozoff* case (*Dalloz*, 1936, i, p. 44). The Court held that it was not sufficient for the deportee to prove that all

2 May 1938 provided that the alien who found it impossible to leave French territory should not be expelled.[1] Similar provisions were included in the Decree-law of 12 November 1938[2] and in the Immigration Ordinance of 2 November 1945.[3] However, the last-mentioned Ordinance provides as follows:

> 'Cette impossibilité est considérée comme démontrée lorsque l'Étranger établit qu'il ne peut ni regagner son pays d'origine ni se rendre dans aucun autre pays.'

This shows that it is still difficult for the refugee to demonstrate his absolute inability to leave the country. Various other states have explicitly refused to give up the right of expulsion even with regard to stateless refugees.[4] It appears that displaced persons can be sent back to camps in Germany if they prove 'unsatisfactory'.[5]

Treaties concerned with certain groups of refugees have not limited the power of expulsion.[6] The arrangement of 1928 concerning the Legal

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countries adjoining France had refused to admit him, as some more distant ones might do so. See to the same effect the decision of the Conseil d'État of 16 May 1924 in the *Yacovleff* case (*Dalloz hebd.*, 1924, p. 477) and a decision of the Court of Appeal of Paris of 26 July 1934 (*Dalloz*, 1934, ii, p. 113). Contrast the decisions of the Tribunal de la Seine, of 31 October 1938 (*Dalloz hebd.*, 1939, p. 15), and of 14 November 1936 in *Zynger*'s case (*Sirey*, 1937, ii, p. 43), of the Court of Appeal of Toulouse of 9 June 1937 in *Brozoza*'s case (ibid., 1938, ii, p. 112), and of the Tribunal Correctionnel of Nice of 4 July 1935 in *Nathanson*'s case (*Dalloz*, 1936, ii, p. 47).

[1] This article was interpreted in the law of 17 June 1938 as meaning that an order of expulsion will not be carried out and that there will be no punishment for its infringement, but that the order of deportation itself remains valid. See on this the decision of the Conseil d'État in the case of *Kaboloeff* (*Sirey*, 1941, iii, p. 14). The decision whether a person is stateless or a refugee and therefore to receive privileged treatment is one for the executive, not for courts. See the *Rozenberg* case, decided by the Court of Appeal of Paris on 25 May 1939, and the *Salom* case, decided by the Conseil d'État on 3 April 1940 (*Gazette du Palais*, 3 May 1940).

[2] *Sirey*, 1939, *Lois*, p. 1082.

[3] Ibid., 1945, *Lois annotés*, pp. 81–6.

[4] These include Austria, Colombia, Egypt, Finland, Monaco, Portugal, and Switzerland (Trachtenberg, loc. cit.).

[5] In the House of Commons on 19 May 1949 the Home Secretary stated that 'those who are unwilling to continue in the types of work open to European Volunteer Workers are free to leave the country. A worker who persistently refuses to comply with the conditions on which he was brought to this country is liable to be deported' (*Weekly Hansard*, No. 127 (13–19 May 1949), col. 593). In December 1948 it was decided to send some 400 Ukrainians back to Germany. Following protests against this decision the Home Office permitted 330 of these to remain 'temporarily' on condition that they be placed in 'suitable employment without detriment to the interests of British subjects', and that they work satisfactorily (*The Times* newspaper, 30 December 1948, p. 4). On 11 January 1949 the Appeals Committee of the London Sessions strongly recommended the reconsideration of a deportation order against two Hungarians who had refused to obey a Ministry of Labour Order (ibid., 12 January 1949, p. 2). The Agreement between France and the Preparatory Commission of the International Refugee Organization provided that if after several attempts displaced persons prove unemployable, or if they break their contracts, they can be sent back to where they came from (*Monthly Digest of PCIRO*, No. 5, p. 24). Contracts concluded between displaced persons and Belgian authorities provide that if the displaced persons leave the employment for which they signed the contract, or if they fall ill, they will be 'repatriated' to Germany (*Official Records of the Second Session of the General Assembly, Third Committee*, pp. 199, 206–7).

[6] With the exception of the provisions, quoted above, prohibiting expulsion to the country of origin of the refugee.

Status of Russian and Armenian refugees, signed by ten states, 'recommended' that refugees should not be expelled. It is obvious that this provision did not create any legal obligation.[1] Article 3 of the Convention of 1933 concerning the International Status of Refugees, which was ratified by eight states, provided that refugees who had been authorized to reside regularly on the territory of a contracting party should not be expelled. This obligation was qualified by the proviso that expulsion could be resorted to if dictated by reasons of national security and public order. As 'national security' and 'public order' are proper subjects for the determination of the executive, French courts have interpreted the whole article to mean that the executive is free to expel refugees when it deems it necessary.[2] It should also be noted with regard to the power of *refoulement* that the Convention did not attempt to limit the power of the state to deport aliens who had not been authorized to reside on its territory. The provisional arrangement of July 1936 concerning the Status of Refugees coming from Germany, signed by seven states, and the definitive Convention of February 1938, signed by the same number of states, contained similar provisions. Various resolutions of the Assembly of the League of Nations were also concerned with the matter. Thus on 7 October 1933 the Assembly voiced 'its earnest appeal to governments not to expel refugees before they have obtained formal permission to enter an adjacent country'.[3] It is quite clear from the phraseology that the Assembly did not intend to impose any obligations on governments.[4] Some governments explicitly refused to accept any obligation in the matter. This can be seen from the replies to an appeal by the Intergovernmental Advisory Commission on Refugees of 24 January 1933 urging governments not to expel or refuse admission to refugees who are unable lawfully to enter another country.[5] The United States replied:

> 'The American Government is not in a position, under existing laws, to give effect to the recommendation in c. III regarding the admission or expulsion of aliens who may be refugees.'

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[1] See the decisions of the French Conseil d'État in the *Giloff* case (1936), *Recueil général du droit international*, 1937, Part iii, p. 19, and the *Kaboloeff* case (1941), *Sirey*, 1941, Part iii, p. 14.

[2] See a decision of the Conseil d'État of 8 February 1939 in the *Guéron* case (*Dalloz hebd.* 1939, p. 325); the decision of the Court of Cassation of 17 December 1937 in the case of *Keledjian Garabed* v. *Public Prosecutor* (*Recueil général du droit international*, 1938, Part iii, p. 69); and a decision of the Court of Appeal of Paris of 10 January 1937 (*Dalloz hebd.*, 1937, p. 228). See also the comment on Art. 24 of the Draft Convention on the Status of Refugees submitted by the Secretary-General of the United Nations to the *Ad Hoc* Committee on Statelessness (Doc. E/AC. 32/2, p. 46) which reproduces the terms of Art. 3 of the Convention of 1933.

[3] *Official Journal of the League of Nations*, 1933, pp. 1326–7. See also the Resolutions of 24 September 1935 (ibid., Suppl. 1934/5, Resolutions of the 16th Assembly, pp. 30–1); of 10 October 1936 (ibid., 1936, Resolutions of the 17th Assembly, pp. 36–9); of 5 October 1937 (ibid., Resolutions of the 18th Assembly, pp. 31–2).

[4] It is therefore unnecessary to discuss the question whether Assembly Resolutions are ever in the nature of a binding obligation on states.

[5] *Official Journal of the League of Nations*, 1933, pp. 854–7.

The Swiss reply was that

> 'Switzerland could hardly waive the right to compel Russian refugees who have been refused permission to stay in Switzerland or whose permission has been withdrawn, to leave . . . .'

Article 12 of the Draft International Covenant on Human Rights which relates to expulsion merely regulates the manner of its exercise.[1]

A curious light is thrown on the consequences of the action of states in this matter by an agreement between France and Belgium of 21 October 1938.[2] It provided that neither party would send undesirable stateless refugees to the territory of the other.[3] The need for a treaty of this nature gives some indication of the magnitude of the problem in terms of human suffering.[4]

3. *Enforceability of rights*

It would thus appear that the practice of states has not created a right of individuals to asylum, except, perhaps, in the matter of the non-extradition of political offenders. It is necessary, nevertheless, to discuss the question of the enforceability of any right of asylum which may, in the future, be conferred upon refugees or which, as in the case of the right not to be extradited for a political offence, is already in process of development. The position of refugees is peculiar in the international sphere in that, whether they are stateless or not, they cannot invoke the protection of their state of origin. Therefore, with regard to them, the inadequacy of the established rule that claims on behalf of private individuals in the international sphere can only be made by the state of their nationality reveals itself most clearly. Three alternative ways of enforcing rights of refugees have been suggested.

The first is that the individual himself should be able to vindicate his rights in the international sphere. This is open to objection on the ground that the procedural capacity of individuals in the international sphere is still rudimentary.[5] Moreover, it has been pointed out that there is no obligatory jurisdiction in the international sphere, and that individuals even if given procedural standing would only be able to bring claims against foreign states within the framework of a treaty of compulsory arbitration between the state of which they are nationals and the foreign state concerned.[6] Refugees would be unable to invoke such a treaty. It is, therefore, doubtful whether in the present state of international law this method would prove satisfactory.

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[1] *Official Records of the Economic and Social Council*, Seventh Session, Supplement No. 2, p. 22.

[2] Text in *Journal de droit international*, 66 (1939), p. 221.

[3] It has indeed been argued that the expulsion of persons to a country they have no permission to enter amounts to the infringement of the sovereignty of the latter.

[4] In 1938 Sir John Hope Simpson described the expulsion of refugees as a 'contraband trade of which the merchandise is the human being' (Simpson, *The Refugee Problem* (1938), p. 247).

[5] On the extent to which states have given individuals procedural capacity in the international sphere, see Lauterpacht in *Law Quarterly Review*, 63 (1947), pp. 450 ff.

[6] Ibid., pp. 453–8.

Secondly, it has been suggested that foreign states may in certain circumstances be able to protect refugees. It was suggested by the Commission of the Institute of International Law which dealt with the question of refugees in 1936 that refugees should be given diplomatic protection by the state on whose territory they are resident.[1] That principle is useful within the limits of its applicability. It is desirable that in his dealings with third states a refugee should be able to look for protection to the state of his permanent residence. But, as has been shown above, the main problem relating to asylum concerns the rights of the refugee against the state of potential refuge. In other words, we must take into account the fact that the refugee either has, as yet, no state of permanent residence, or that he needs protection precisely against that state. The diplomatic protection of that state will not, therefore, solve the main problem. There is another category of states which might, more usefully, protect the individual refugee. It is clear that, in the absence of a general principle of international law, a right to asylum must be conferred on refugees by treaty. Signatories of such a treaty may be considered to have the right to ensure its application.[2] One objection may be made against this method, however. It is open to doubt whether the legal consciousness of states is so highly developed that they may be relied upon for the enforcement of rights in the application of which they have no direct interest, and which can only adversely affect their relations with other states.

Finally, rights of individuals in the matter of asylum may be enforced by an international agency. In 1936 several members[3] of the Commission of the Institute of International Law concerned with the status of refugees suggested that these should be protected by an international organ. M. Barbosa de Magalhaes supported this view on the ground that the action of an international organ could be effectively controlled, while the obligations of individual states with regard to the protection of refugees cannot be enforced. But the final Report of the Commission is conspicuous for its lack of faith in the efficacy of international protection. It reads:

> 'La protection internationale qui sera exercée par un organe international au profit des réfugiés n'aura pas à tous les égards la même signification ni la même portée que celle exercée par un État. Nous croyons que la plupart des personnes préféreront être placées sous la protection, même conditionnelle, d'un État plutôt que se voir accorder le droit de réclamer la protection d'un organe international, régime revêtant fortement le caractère d'un pis-aller.'

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[1] *Annuaire*, vol. 39 (i) (1936), p. 76.

[2] The powers of the members of the League of Nations under the Minority Treaties and the Mandate Agreements are an instructive analogy.

[3] Among them McNair, Barbosa de Magalhaes, and Borel.

It is true that the present powers of international organizations are weak. But, equally, it has been shown that the rights of individuals with regard to asylum are still a matter of the future. The fate of proposals to give individuals a true right of asylum has been described above. To complete the picture we must outline the existing powers of international organs in the matter of providing asylum for refugees, and discuss proposals which have been made, unsuccessfully, for their extension.

III. *International protection of refugees*

A great deal has been written on international aid to refugees between the two World Wars.[1] In the present context we may mention the functions of the various international organs which then dealt with refugees: the High Commissariat for Russian and Armenian Refugees; the Nansen Office; and the High Commissariat for Refugees coming from Germany. They gave refugees a limited diplomatic protection. In other words, if action was taken in some country against a refugee, the representative of the League might apply to the Minister concerned for a revision of the decision.[2] They had certain quasi-consular functions such as certifying the identity of refugees, and attesting documents presented by them.[3] They also exercised the general function of collecting information on matters concerning refugees. But their main purpose was to negotiate agreements between states on various questions affecting refugees. Under their auspices a system of uniform identity and travel documents was created.[4] They also successfully urged states to create the rudiments of a legal status for refugees.[5] They attempted, with less success, to ameliorate the position of refugees with regard to expulsion[6] and employment.[7] The part played by these international agencies was essentially one of co-ordinating the activities of states.[1] They were not able to compel states to take any particular action, such as admitting refugees. The resignation, in 1936, of Mr. James G. McDonald from the office of High Commissioner for Refugees drew attention to the impotence of these guardians of the interests of refugees.

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[1] See, e.g., Simpson, op cit.; Turpin, *L'Asile politique* (1937); Reale in *Recueil des Cours, Académie de Droit International de la Haye*, 63 (1938), pp. 473–599; Jennings in this *Year Book*, 20 (1939), pp. 98 ff.

[2] See League of Nations Doc. A. 27. 1936. xii, p. 10, on intervention by the Nansen Office in expulsion cases.

[3] Arrangement of 30 June 1928 (Hudson, *International Legislation*, vol. iv, p. 2486); Statute of the Nansen Office (ibid., vol. v, p. 872). Such certificates have official character before French courts. See the *Wolonski* case (*Dalloz hebd.*, 1939, p. 360).

[4] Arrangement of July 1922, put into force by 52 states (Hudson, op. cit., vol. ii, pp. 373–5); Arrangement of 31 May 1924, put into force by 38 states (ibid., p. 1288); Arrangement of 30 June 1928, put into force by 10 states (ibid., vol. iv, p. 2486); Convention of 1933, ratified by 8 states (ibid., vol. vi, p. 483); Arrangement of July 1935, put into force by 17 states (ibid., vol. vii, p. 161); Arrangement of July 1936, put into force by 8 states (ibid., p. 376). See also the London Agreement of 15 October 1946, signed by 18 states (Cmd. 2033, 1947).

[5] Arrangement of 30 June 1928, Arts. 1–6; Convention of 1933, Art. 4; Convention of 1938, Arts. 6–8.

[6] Arrangement of 30 June 1928, Art. 7; Convention of 1933, Art. 3; Arrangement of July 1936, Art. 4; Convention of 1938.

[7] Arrangement of 30 June 1928. There were vague clauses in the Conventions of 1933 and 1938. Many signatories made reservations against these.

The position of the organs entrusted with the care of refugees since the Second World War[2] has been essentially similar. Again they have had no power to compel states to take any action.[3] They have merely been able to co-ordinate the efforts of states wishing to further the re-establishment of refugees.[4] The resettlement of refugees has therefore been wholly dependent on the willingness of states to admit them.[5] The difficulty of the organs established to care for refugees in their specific task is that of international organization in general. States are not, as yet, prepared to surrender, in favour of international organs, sufficient rights and powers to make their action effective.

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[1] The function of the High Commissioner for Refugees coming from Germany, as set out in the Assembly Resolution of 11 October 1933, was to 'negotiate and direct international collaboration' (*Official Journal of the League of Nations*, 1933, pp. 1616–18).

[2] Until 31 July 1947 refugees were cared for by the United Nations Relief and Rehabilitation Administration (U.N.R.R.A.) and the Intergovernmental Committee on Refugees. (The latter was originally set up at the Evian Conference in 1938. It was reorganized in August 1944 in accordance with recommendations made by the Anglo-American Conference on Refugees held at Bermuda in April 1943.) The High Commissariat for Refugees of the League of Nations also survived until the dissolution of the League, but was no longer capable of great activity. From August 1947 to August 1948 the organ responsible for refugees was the Preparatory Commission of the International Refugee Organization, which was set up by a Resolution of the General Assembly of the United Nations of 15 December 1946 (*Year Book of the United Nations*, 1946/7, pp. 819–20). At the end of August 1948 the International Refugee Organization began operations. Its work was to cease on 1 January 1951. (For its constitution see *Journal of the General Assembly*, Second Part of First Session, No. 75, p. 860.) On 1 January 1951 its place was to be taken by a High Commissioner for Refugees to be appointed for a term of three years (General Assembly Resolution of 2 December 1949, printed in *United Nations Bulletin*, 7 (1949), p. 723).

[3] In a resolution of 17 November 1947 the General Assembly of the United Nations 'recommended' that states should take a fair share of non-repatriable refugees (*Official Records of the General Assembly*, Second Session, Resolutions, pp. 44–5). There was no success in drawing up a 'fair-share' plan (PC/PI/MD/7, p. 1, and E/816, p. 48). See also the cautious language of the Economic and Social Council in a Resolution of 9 March 1949, which 'stressed the necessity for continuing efforts so far made by the IRO to extend the resettlement of refugees in family units through negotiations with countries receiving displaced persons' and 'requested states to examine sympathetically every possibility of acting in the matter' (*Official Records of the Economic and Social Council*, Eighth Session, Suppl. No. 1).

[4] The nature of their activities is well illustrated by the functions of the High Commissioner for Refugees as outlined in the Assembly Resolution of 2 December 1949 (*United Nations Bulletin*, 7 (1949), p. 723):

> To promote the conclusion and ratification of international conventions providing for the protection of refugees . . .;
>
> to promote, through special agreements with governments, the execution of any measures calculated to improve the situation of refugees and to reduce the number of refugees requiring protection;
>
> to assist governments and private organizations in their efforts to promote voluntary repatriation of refugees or their assimilation within new national communities;
>
> to facilitate the co-ordination of the efforts of voluntary agencies concerned with the welfare of refugees; etc. etc.

[5] See the Report of Hambro and Pierce Williams on the Progress and Prospects of Repatriation, Resettlement, and Immigration of Refugees and Displaced Persons presented to the Economic and Social Council on 10 June 1948 (Doc. E/816): 'What has been accomplished by way of mass resettlement has been *according to the requirements of the various governments*. . . .' Certain categories of refugees, such as the old, the very young, and professional people, have failed to secure such admission. See a statement of the Director-General of the International Refugee Organization, printed in *United Nations Bulletin*, 5 (1948), p. 854.

This was illustrated by the fate of a French proposal in the Third Committee of the General Assembly of the United Nations on 3 November 1948 to the effect that the United Nations should be authorized to enforce the right of asylum.[1] The proposal assumed that Article 14 of the Declaration of Human Rights would guarantee the individual a right of asylum. As such a right is essentially of an international nature, it was proposed that the responsibility for enforcing it should rest with the international community as a whole, represented by the United Nations. The international organization would fulfil a second purpose in co-ordinating the movements of refugees so as to prevent a disproportionately heavy burden from falling on any one state. In a real sense, then, the international organization would act 'in the interest of the victims of persecution as well as of the states called upon to offer refuge'.[2] The assumption on which this proposal rested was found to be erroneous. The majority of states were not prepared to grant the individual a true right of asylum enforceable against the state of potential refuge.[3] They could, therefore, not admit the power of an international organization to 'secure' asylum for refugees. Their view was well summed up by the United Kingdom delegate:

> 'In the last instance it was for the state to admit or not to admit any particular person. The French amendment seemed to give the United Nations the right to invite Member States to grant asylum. The United Kingdom delegation could not accept such a principle.'[4]

Several states, though prepared to give a right of asylum to a limited category of individuals, did not find the suggestion of international supervision acceptable. Their view was expressed by the delegate of Soviet Russia as follows:

> 'It was tantamount to asking the United Nations to intervene in the domestic jurisdiction of states, in violation of the Charter.'[5]

As individuals were not granted a right to asylum it was, moreover, not necessary for states to have a permanent instrument of co-ordination. Unless pressed by their conscience, they are wholly competent to exclude unwanted refugees. The French proposal was defeated.[6]

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[1] The text of the French Amendment was as follows: 'The United Nations, in concert with the countries concerned, is required to secure such asylum for [the individual]' (Doc. A/C. 3/244).

[2] Speech by M. Cassin, the French delegate, before the Third Committee of the General Assembly (Doc. A/C. 3/SR. 121, p. 3).

[3] See above, pp. 336, 337.

[4] Doc. A/C. 3/SR. 121, p. 5.

[5] Doc. A/C. 3/SR. 122, p. 3.

[6] Twelve states voted in favour of the proposal, twenty-four against it, and nine abstained. Doc. A/C. 3/SR. 122, p. 7.

It may be that provisions regarding a right of asylum and its international enforcement are out of place in an instrument concerned with the protection of human rights within states. When these are effectively safeguarded the right of asylum will become unnecessary. But the protection of human rights is still in a rudimentary stage. The Universal Declaration of Human Rights does not create legal rights or obligations. A 'Covenant' which will have legal effects, and proposals for its implementation, are still in process of discussion. Accordingly, while the real solution of the problem of asylum lies in the elimination of conditions which create refugees, it may be asked whether there is not room, in the meantime, for some action on the part of states with the object of ameliorating the existing position of individuals in the matter of asylum.

THE POSITION OF FOREIGNERS IN EGYPT ON THE TERMINATION OF THE MIXED COURTS

By A. McDOUGALL

On 14 October 1949 the Mixed Courts of Egypt came to an end and their jurisdiction passed to the Egyptian National Courts. On the same day the Consular Courts, still maintained by some of the former Capitulatory Powers (including the United Kingdom), also came to an end, and their jurisdiction over the personal status cases of their nationals also passed to the Egyptian National Courts. Simultaneously, certain other guarantees of fair treatment in Egypt to foreigners of European origin expired, leaving them for the first time in several hundred years without treaty protection for their legitimate interests in that country.

That foreigners should find themselves in this situation was not contemplated at the Conference of Montreux in 1937, when the Convention of 8 May 1937 regarding the abolition of the Capitulations in Egypt was concluded. On the contrary, the Governments (including the Egyptian Government) which took part in that conference were very much aware of the need for regulating by treaty before the termination of the Mixed Courts the future position of foreigners there. But the war of 1939 supervened before establishment treaties and consular conventions could be negotiated, and only now, after the Mixed Courts have ceased to exist, is it proving possible to negotiate with Egypt the conditions on which foreigners may enter (and leave) the country, and may reside and pursue their legitimate interests there. Meanwhile they have such rights as public international law accords, with the benefit of an Egyptian undertaking not to discriminate against them.

In the 1937 volume (pp. 79 ff.) of this *Year Book* there is an authoritative account of the Anglo-Egyptian Treaty of Alliance of 1936 and of the plan embodied in it for the abolition of the capitulations, while in the 1938 volume (pp. 161 ff.) there is a scholarly and equally authoritative account of the Montreux Conference of April/May 1937, and of the Convention and other Agreements concluded at it. Within the compass of the present article it is impossible to do more than discuss briefly the changes brought about by the Final Act of the Montreux Conference in the situation of foreigners in Egypt, including the changes wrought in the Mixed Courts themselves leading to their abolition. The history of the Capitulations in Egypt has yet to be written.[1]

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[1] Judge J. Y. Brinton's history of the Mixed Courts will, it may be hoped, be brought up to date by its distinguished author who, on retiring from the Presidency of the Mixed Court of Appeal in 1948, became Legal Adviser to the United States Embassy in Cairo.

It is convenient to discuss the subject-matter of this article in two parts, namely, the position of foreigners in Egypt since 1937 generally, and (by way of Note), the termination of the Mixed Courts and Consular Courts and the consequential jurisdictional changes.

By way of introduction to this article it is desirable to recall two factors which are relevant to the question of the future of foreigners and foreign interests in Egypt. The first is that for many centuries Egypt has been the home of large numbers of foreigners and is so to-day. Under the protection of the Capitulations foreigners of European origin have come and gone freely, but many, mainly from Mediterranean countries, have settled there and for generations have retained and still retain their foreign nationality. For these Egypt is their only real home. In whatever arrangements are made for the future, account must be taken of the substantial numbers of British, Greek, Italian, and other foreign nationals who have never lived anywhere but in Egypt.

The second relevant fact is that the economic development of modern Egypt has been due in large part to foreign investment, which in turn has been due to the stability and security afforded by the predominant British position in Egypt and to confidence in the justice in civil and commercial matters administered by the Mixed Courts.

There are, therefore, as the result of history, substantial foreign interests in Egypt which have come into existence under the protection of a treaty system which no longer exists. Egypt now enjoys a large freedom under international law to decide whether intercourse with other countries which has been mutually beneficial in the past shall be developed in the future or restricted.

Until the Convention of Montreux foreigners (a term which will be used to mean nationals of Capitulatory Powers, unless it is otherwise stated) were immune from the criminal jurisdiction of the Egyptian Courts and could be tried only by their own Consular Courts, which also were alone competent to decide questions affecting their personal status. They were also exempt from ordinary Egyptian legislation unless the Legislative Assembly of the Mixed Court of Appeal accepted it as applicable to them, while the application of Egyptian financial legislation to foreigners required the formal consent of their Governments. The extent of Egyptian jurisdiction over foreigners was therefore confined to that exercised by the Mixed Courts in civil and commercial matters, other than those of personal status, and the very limited criminal jurisdiction exercised by those Courts, ancillary to their civil jurisdiction, in respect of, for example, bankruptcy offences or contempt of court.

The very large exemption from Egyptian jurisdiction which was thus enjoyed allowed foreigners to come and go freely, and to reside and pursue their interests in Egypt without significant restriction by the Egyptian authorities and subject in the main only to such penalties for misconduct as the laws of their own countries provided and their own Consular Courts chose to impose. Even when found guilty of offences by these Courts the Egyptian Government could not expel them without the consent of their Consuls, and it is notorious that great abuses existed.

From the time of its first intimate association with the administration of government in Egypt, after the military occupation of the country in 1882, the British Government regarded the abolition of the Capitulations as a primary object of its policy whenever conditions should permit. The substantial exemption of the increasingly wealthy foreign business men from taxation and the consequential exemption of Egyptian business men (for the idea of discriminatory taxation of the latter while the former went free was not entertained), and the almost complete immunity of foreigners from the criminal jurisdiction of the Egyptian courts created very serious impediments to good government generally. The defeat of the Central Powers in the War of 1914–18 afforded the opportunity of depriving Germany and Austria of their capitulatory rights in Egypt, but not until 1937 were conditions favourable for Egypt with Britain's support, pledged in the 1936 Treaty of Alliance, to seek from all the other capitulatory Powers the abandonment of their rights.[1] Meanwhile, although Britain had in 1922 recognized Egypt as independent, she had reserved responsibility for the protection of foreign interests in Egypt and the protection of minorities. By Article 12 of the 1936 Treaty this reservation was, in effect, withdrawn as to both foreigners and minorities by the express provision 'that the responsibility for the lives and property of foreigners in Egypt devolves exclusively upon the Egyptian Government, who will ensure the fulfilment of their obligations in this respect'. This Egyptian obligation subsists alongside what other obligations are imposed on Egypt by international law or have been or may in the future be assumed by her by treaty.

The fundamental changes made at Montreux in the legal position of foreigners in Egypt were, first, their subjection in all matters to Egyptian legislation, which would no longer require approval by foreign governments or the Mixed Courts before being applied to them; and secondly, following from the first, their subjection to the Mixed Courts in criminal matters and, if Consular Courts were not temporarily retained for the purpose, in matters of personal status as well. The legal position of foreigners in Egypt was, therefore, very substantially modified. At the same time, however, considerable guarantees of fair treatment were retained for the duration of the transition period of twelve years, during which the Egyptian Mixed Courts were to continue in existence. Many of these guarantees depended upon the Mixed Courts system itself and naturally fell when that system came to an end on 14 October 1949. Others depended on separate provisions in the Convention and other Agreements made at Montreux for the enforcement of which diplomatic action would be necessary, but most of these, too, were for the duration only of the transition period. A few, no longer secured by treaty, remain, so far, in practical effect under Egyptian law. The nature of these guarantees must be examined.

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[1] Russia's capitulatory rights in Egypt ceased to be recognized after the 1917 revolution, by reason of the non-recognition of the Bolshevik Government.

After Montreux, as before, the principal security for the legitimate interests of foreigners was the Mixed Courts, to which alone among Egyptian courts they continued to be subject. This security depended in the first place upon the high tradition of even-handed justice administered by those courts in accordance with modern and enlightened codes of law, based in the main on continental systems. It depended in the second place upon the continuance in office of a substantial, though progressively diminishing, number of foreign judges and officials in the Mixed Courts.

Moreover, with the transfer to the Mixed Courts from the Consular Courts of criminal and (where the latter Courts were not maintained for the purpose) of personal status jurisdiction over foreigners, the Parquet was strengthened and considerable new powers were entrusted to the foreign (British) Procurator-General at its head who, in addition to a First Advocate-General of Egyptian nationality, was assisted by a Second Advocate-General of foreign nationality (also British) for criminal matters.

The foreign Procurator-General's powers, during the transition period, may be summarized as follows: he had access to all sittings of the Mixed Courts; he was in charge of the Parquet which controlled the judicial police; his advice was necessary whenever there was a question of remission of a sentence on a foreigner or of the execution of capital punishment; he had supervision of prisons in which foreigners were detained and right of access at all times to any other place where a foreigner might be detained, together with the right and duty of calling the attention of the Minister of Justice to any irregularities; he had the right and duty to intervene in all cases concerning personal status, nationality, minors and others subject to legal incapacity; the Parquet, under him, controlled Court funds. In addition, foreigners could not be arrested (unless taken *flagrante delicto*), nor their houses searched (unless a call for help from within were made) except in the presence of a member of the Mixed Parquet or the judicial police under the authority of the Parquet, and in every case of the detention of a foreigner the Parquet had to be informed at once and he had to be either released or brought before a magistrate within four days. Moreover, a foreigner when arrested was entitled to inform his consul and his lawyer, both of whom were entitled to visit him in prison under conditions approved by the foreign-directed Mixed Parquet. He was entitled also, in principle, to be accompanied by his lawyer on interrogation and to have counsel assigned to him a reasonable time before trial.

For his personal security, therefore, the foreigner enjoyed, during the transition period when first he became subject to the full jurisdiction of the Egyptian Courts in criminal matters, substantial safeguards against wrongful arrest and wrongful detention, and guarantees of a quick and fair trial. If he were sentenced to imprisonment he was under the eye of the foreign Procurator-General, he could be visited by his Consul, and he was entitled to amenities suitable for a European in accordance with the Mixed Courts Prison Regulation of 1914.

The Prison Regulation of 1914 was, however, made at a time when the Mixed Courts had criminal jurisdiction only over offences arising out of their civil jurisdiction, that is, contempt of court, bankruptcy offences, &c. At that time all serious crimes were within the competence of the Consular Courts, applying their own national law, and it was customary to send persons sentenced to any serious penalty back to their own country for punishment. Thus it was that the 1914 Regulation dealt only with persons sentenced for less serious offences and not those sentenced for serious crimes entailing penal servitude. A new situation arose, so far as imprisonment of foreigners was concerned, when full criminal jurisdiction over them was transferred from the Consular to the Mixed Courts. The situation which particularly called for new Egyptian legislation (whether or not any provision were made by treaty, and none was in fact made) was the conditions in which foreigners sentenced to penal servitude by the Mixed Courts should serve their sentences. The point was not that the treatment accorded Egyptian convicts was necessarily inhumane, but that similar treatment, if accorded persons of European origin or indeed any persons of a distinctly higher standard of living than that to which the run of Egyptian felons were accustomed, would be excessively severe and would amount in practice to an unintended increase in the severity of the punishment when applied to these persons. For example, chains were (and are) a normal part of treatment in Egyptian convict prisons; the food was suitable only for those of the peasant class; hats and shoes were not used by convicts even when working in quarries in the torrid heat of the Egyptian summer. Close association with the average Egyptian convict could have the most degrading effect on the more gently nurtured prisoners.

The drafting of a new prison law in the light of modern civilized practice was undertaken by successive committees which sat during the transition period and successive drafts were prepared, but none had become law (or perhaps had even been submitted to Parliament) by 14 October 1949. During the transition period the exercise of the right and duty of the Procurator-General of the Mixed Courts to inspect all places where foreigners were detained served in practice as a reasonably sure protection to foreigners in convict prisons against undue hardship, but that security has now gone. What guarantees of humane treatment in the future will be given by the Egyptian Government remains to be seen.

With the passing of the Mixed Courts have also gone the special provisions of the Mixed Code of Criminal Procedure giving effect to the guarantees contained in the Montreux Convention against wrongful arrest and detention of foreigners, and the less ample provisions of the national Code now apply.

Two other aspects of the personal freedom of foreigners in Egypt call for comment, namely, deportation and extradition.

In response to a proposal made by the Netherlands delegation the Egyptian Government included in its Declaration made at the Conference, as part of the bargain for the abolition of the Capitulations, the following:

> '4. Deportation.
>
> ' Although the abolition of Capitulations entails the removal of all the existing restrictions on the Royal Egyptian Government's right to deport foreigners who are within Egyptian territory, nevertheless that Government does not intend to exercise during the transition period its right of deportation in respect of a foreigner subject to the jurisdiction of the Mixed Tribunals who shall have resided in Egypt for at least five years, or to refuse such a foreigner access to Egyptian territory, if he has temporarily quitted that territory, unless:
>
> (*a*) he has been convicted in respect of a crime or misdemeanour punishable by more than three month's [*sic*] imprisonment, or
>
> (*b*) he has been guilty of activities of a subversive nature or to the prejudice of public order or public tranquillity, morality or health, or
>
> (*c*) he is indigent and a burden upon the State.
>
> 'The Royal Egyptian Government further proposes to set up an administrative advisory committee, of which the Procurator General of the Mixed Tribunals shall be a member, for the purpose of examining any disputes on the subject of the identity or the nationality of the person whose deportation is under consideration, or of the length of his residence in Egypt, or of the existence of the facts which constitute the grounds for deportation.'

The report of the Drafting and Co-ordinating Committee of the Conference records that:

> 'The Egyptian delegation explained to the committee that the expression "activités portant atteinte à la tranquillité", was to be understood as meaning not isolated acts disturbing tranquillity, but a series of repeated acts, that is to say, a continued form of conduct presenting such a character.'

By decree of 22 June 1938 the administrative advisory committee was established. It functioned during the transition period, but has now ceased to exist.

With the introduction of visa requirements for foreigners in Egypt, those who enjoyed the benefit of the Government's declaration on deportation were granted permits to reside indefinitely, but in the course of time some departments of the Egyptian Government began to take and act upon the view that to qualify for this benefit a foreigner must prove five years' residence prior to the Montreux Convention. Other Parties to the Convention have taken a different view and have maintained that any foreigner allowed by the Egyptian Government to reside in Egypt for five years, even after the Convention, was entitled not to be deported except for the reasons set out in the declaration, and it was on this view that the administrative advisory committee acted. Nevertheless, in the latter part of the transition period foreigners who so qualified for protection were granted, as opportunity offered, visas or stay permits only from year to year.

A question which was considered during the period by the Egyptian authorities was whether they could legally deport foreigners *en masse*. Their legal advisers' view was that deportation *en masse* is not forbidden by international law, but even if it were practicable, it would justify retaliation (or retorsion) by other countries. The discussion of itself created alarm among the large settled foreign communities in Egypt, and should such a measure ever be taken against them, the question of its legality, including the question whether they have not an 'acquired right' to continue to live in Egypt, could be referred to the International Court of Justice under Articles 2 and 13 of the Montreux Convention. In the same way could be tested the right of the Egyptian Government to deport inoffensive individual foreigners long resident in Egypt.

The other aspect of personal freedom dealt with in the Egyptian Government's declaration was extradition. Until 1937 the question whether a foreigner should be extradited from Egypt was a matter to be settled by his own Government, and in view of the general practice of governments not to deliver up their own nationals to foreign governments it probably seldom occurred. But with the acquisition of full legislative sovereignty by Egypt over foreigners, it became a matter of importance to their governments that some safeguards against the extradition of their nationals by the Egyptian Government without proper cause should be established. Consequently, the Egyptian Government made the following declaration:

5. *Extradition*

> 'In conformity with the practice generally adopted in regard to extradition, the Royal Egyptian Government intends to adopt judicial procedure in this matter. It will therefore be necessary for the Mixed Tribunals to pronounce upon the regularity of the request for extradition when such request relates to a foreigner within the jurisdiction of the said Tribunals.'

By this declaration the Egyptian Government undertook to conform with the better modern practice of extraditing persons only after a judicial and not merely an administrative inquiry. It is a question whether with the termination of the Mixed Tribunals this declaration has now been exhausted. What is important to foreigners for the future is that the Egyptian Government should continue to carry out the intention there declared in accordance with the practice of modern civilized states.

Of great importance to foreigners in any country is the protection which may be accorded them and their interests by their Consular officers, more particularly in the matter of personal freedom. The British declaration terminating the Protectorate in 1922 and recognizing Egypt to be an independent sovereign state (except in respect of certain reserved matters) was accompanied by a statement to the Sultan that

> 'there is no obstacle to the re-establishment forthwith of an Egyptian Ministry for Foreign Affairs which will prepare the way for the creation of the diplomatic and consular representation of Egypt'.

The corollary was that foreign states began to send diplomatic representatives to Egypt and their consuls began to take on the character and normal functions of consuls, leaving the quasi-diplomatic functions formerly exercised by them to the new representatives. The extent of this change of status of foreign consuls was indicated by the provision of Article 11 of the Montreux Convention which subjected them to the jurisdiction of the Mixed Courts, although 'without prejudice to the exceptions recognized by international law'. They were to be accorded personal immunity and, subject to reciprocity, they were to be permitted to exercise the powers customarily granted to consuls to protect the interests of their nationals. Also they were to enjoy their existing fiscal privileges until Consular Conventions were concluded and in any case during a period of three years from the date of the signature of the Convention. Exactly three years after this date the Egyptian Government presented a model draft Consular Convention to the Montreux Powers, but owing to the war serious negotiations have only recently begun and the transition period expired without any new agreements being made. While, therefore, it was provided in the Montreux Convention that foreign consuls should continue to function without limit of time on a basis of reciprocity, and explicit provision was made *inter alia* for them during the transition period to have access under conditions fixed by the Mixed Parquet to their nationals who were detained by the Egyptian authorities, the situation both as to the admission of consuls to Egypt and the powers they may exercise there has depended since 14 October 1949 on the rules of international law. Consequently, in the important matter of personal freedom as in other matters, foreigners in Egypt enjoy to-day only those rights to consular protection which international law accords under an undertaking to grant reciprocal treatment. In the Western world a consul is generally regarded as having the right to visit any national of his immediately on arrest and this was secured for the transition period by the Montreux Convention, but recent events in Eastern Europe have shown how important it is that this elementary and inoffensive security for the fair treatment of foreigners be spelt out in a precise way for the future by treaty.

Another guarantee which calls for notice was the jurisdiction of the Mixed Courts during the transition period to hear cases brought by foreigners against the state concerning property, and in respect of administrative measures taken in violation of laws or regulations.

With the abolition of the right of the Mixed Courts to determine whether any Egyptian law should apply to foreigners, it was also desired to deprive those Courts of the right to determine whether an Egyptian law was or was not consistent with Egypt's treaty obligations. Consequently it was provided in Article 43 of the revised Regulation annexed to the Convention:

> 'The Mixed Tribunals may not directly or indirectly pass judgment on acts of sovereignty. They may not give decisions on the validity of the application of Egyptian laws or regulations to foreigners. Furthermore, they may not give decisions on the ownership of public property.
>
> 'Nevertheless, though they may not interpret an administrative act or arrest the execution thereof, they shall be competent to hear (1) all civil and commercial actions between foreigners and the State concerning movable or immovable property; (2) civil actions brought by foreigners against the State in respect of administrative measures taken in violation of laws or regulations.'

The Report of the Drafting and Co-ordinating Committee says, by way of explanation:

> 'This article was retained in the form adopted by the Committee, in the light of the observations made at the plenary meeting (P. V. 5, pp. 193–8) from which it appears:'
>
> '(1) that the expression "laws and regulations" should be understood as covering also provisions of treaties, which are of such a nature, that it has been necessary for the Egyptian Government to enact them in the form of municipal laws;
>
> '(2) that the term "violation" should be taken to mean not only violations of the letter but also violations of the spirit of the law.
>
> 'It is further understood that the absence of jurisdiction to question the validity of the application to foreigners of Egyptian laws or regulations entails as a consequence also the absence of any jurisdiction to consider whether Egyptian laws are inconsistent with the principles generally adopted in modern legislations or whether they discriminate against foreigners.'

The exclusion of the competence of the Mixed Courts in this matter of the validity or invalidity of Egyptian legislation, emphasized the existence of a hiatus in the Egyptian legal system, for the Egyptian Constitution itself provides that it may not be applied so as to infringe the rights of foreigners under treaty, but when the quite independent power of the Mixed Courts to secure these rights by refusing to approve legislation infringing them disappeared, there was no established jurisdiction in Egypt to enforce this constitutional provision. Whether this hiatus was partially filled by the establishment of the *Conseil d'État* in 1946, appears to be doubtful.

In any case the Montreux Convention clearly excluded the Mixed Courts from this field, but it did leave them with jurisdiction to award damages to foreigners for violation by the Egyptian authorities of Egyptian laws and regulations. The value to foreigners of this jurisdiction was illustrated in 1949, when the Mixed Court of Appeal upheld the award of heavy damages to two Greek restaurant proprietors whose property had suffered severe damage during the riots in Alexandria in March 1946. The Court held that the Egyptian security forces, the police and the army, had been negligent in the execution of their duties and that the Government was responsible for the consequences of its agents' default. The question of negligence or no negligence on the part of state servants is a question of fact and the answer depends, naturally, upon the circumstances of each case. It so happened that in an action brought by an Egyptian in the National Court for damages arising out of the same riots, that Court held that there was no negligence. Although the Mixed Courts have gone, foreigners continue to have the right, like Egyptians, to sue the Government for damages arising from administrative measures taken in violation of laws or regulations, but the future alone will show whether in their appreciation of the facts, case by case, the judges of the Egyptian National Court will give an extensive or restricted interpretation to the Government's liability. The right of the individual continues under Egyptian law, but what its content will prove to be in practice is one of the imponderables following upon the transfer of jurisdiction from the Mixed to the National Courts.

We come now to the most important of all the guarantees given by the Egyptian Government at Montreux for the fair treatment of foreigners in the future, not only during but also after the transition period. In accordance with the declared purpose of the Conference of Montreux of 1937, pride of place was given in Article 1 of the Convention to the agreement of the Parties 'to the complete abolition in all respects of Capitulations in Egypt'. It is incontestable in law that the effect of this unqualified provision was to destroy the whole edifice of capitulatory rights at one blow, leaving no basis for claiming those rights in the future. All that could be claimed in the future would have to be justified by reference to international law or to some obligation expressly assumed by Egypt either in the Montreux Convention itself or in the other Acts of the Conference, or elsewhere.

The article in this categorical form was not accepted without very considerable resistance and discussion.[1] In particular it was pointed out that the Capitulations constituted the charter of foreigners in Egypt, that they were, in truth, a treaty of establishment, and that while the Egyptian draft Convention dealt with the consequences in the legislative and judicial fields of the abolition of the Capitulations, it made no provision whatever for guaranteeing in the future the legitimate rights and interests of foreigners. Although the other Delegations yielded to the Egyptian desire for an unqualified provision abolishing the Capitulations, and indeed accepted a statement in the Preamble of the Convention that 'following upon the abolition by common agreement of the said régime, there should be established between them [i.e. the Parties] relations based on respect for the independence and sovereignty of States and on ordinary international law', the Preamble also recorded the sincere desire of the Parties 'to facilitate the most extensive and friendly co-operation between them', and the Convention itself and other Acts of the Conference did in fact contain assurances for the fair treatment of foreigners in the future, without which 'the most extensive and friendly co-operation' could not be expected to continue or develop.

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[1] *Green Book*, pp. 58 ff.

What the Egyptian Government claimed to be seeking at Montreux was equality of treatment with foreigners in Egypt for Egyptian nationals. What the Capitulatory Powers were seeking was an undertaking by the Egyptian Government that when it obtained its freedom to bring this situation about it should not go further and discriminate against foreigners and so make their position in Egypt worse than that of Egyptians. In the event the Egyptian Government gave that undertaking, and now that the Mixed Courts, with their associated complex of guarantees to foreigners, have gone, it is of primary importance for the future of foreigners in Egypt that the nature and content of the Egyptian Government's undertaking should be understood.

The contest developed around Article 2 of the Convention which was designed to accord Egypt full legislative sovereignty over foreigners. In the Egyptian draft that article provided simply that

> 'subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters'.

In paragraph 6 of the Annex to Article 13 of the Anglo-Egyptian Treaty of Alliance the Egyptian Government had already formally declared as part of the agreed arrangements for the abolition of the Capitulations that

> 'no Egyptian legislation made applicable to foreigners will be inconsistent with the principles generally adopted in modern legislation or, with particular relation to legislation of a fiscal nature, discriminate against foreigners, including foreign corporate bodies'.

The discussion opened, therefore, with something already given on each side—for Egypt legislative sovereignty; for foreigners no discrimination in its exercise.

To the Egyptian draft of Article 2, therefore, the British and Portuguese Delegations proposed additions substantially in the terms above quoted from the 1936 Treaty of Alliance.[1] The amendment so proposed was not intended to enable the Egyptian Courts (including the Mixed Courts while they lasted) to hold Egyptian legislation invalid, but it was intended to provide the basis, in the first place, for diplomatic action to secure the performance of this contractual obligation and, in the second place, for reference to the Permanent Court of International Justice if it were not honoured. This reference was, in fact, provided for in Article 13 of the Convention, which still remains in force.

The Egyptian Delegation was prepared to accept the addition provided that it was limited in point of time to the transition period, for it claimed, and the British Delegation acknowledged, that a legal obligation of that kind without limit of time would amount in reality to a new kind of Capitulation.[2] The British view was that by making this obligation of non-discrimination legally binding during the transition period of twelve years, during which the Mixed Courts would continue in existence, time would be given for regulating this matter for the future by Establishment Treaties to be concluded between Egypt and each of the Powers represented at the Conference. A further addition proposed by the Egyptian Delegation was thereupon adopted which limited the application of the first addition to the transition period in so far as it did not constitute a recognized rule of international law.

Article 2 in its final form comprised, therefore, three paragraphs as follows:

> *Article 2*
>
> Subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters.
>
> It is understood that the legislation to which foreigners will be subject will not be inconsistent with the principles generally adopted in modern legislation, and will not, with particular relation to legislation of a fiscal nature, entail any discrimination against foreigners or against companies incorporated in accordance with Egyptian law wherein foreigners are substantially interested.
>
> The immediately preceding paragraph, in so far as it does not constitute a recognised rule of international law, shall apply only during the transition period.

This was not, however, the end of the matter. The last paragraph of the article could be taken to imply that the Egyptian Government had it in mind to pursue after the end of the transition period a contrary policy of discriminating against foreigners, a policy for which there was no scope under the plan agreed upon in the 1936 Treaty. This implication the Egyptian Delegation was at pains categorically to disclaim, expressing at the same time the readiness of the Egyptian Government to enter into establishment treaties with the other Powers on the basis of reciprocity. The Egyptian invitation to the Conference had, in conformity with the 1936 Treaty of Alliance, formally declared the Egyptian intention, without limit of time, not to discriminate against foreigners in the exercise of legislative sovereignty, and the British Delegation's support for the Egyptian addition of the third paragraph to Article 2 was expressly based upon its understanding that the intention of the Egyptian Government was to pursue a policy of non-discrimination against foreigners, and that:

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[1] *Green Book*, p. 87.

[2] Ibid., pp. 88–90.

> 'In the exercise of its legislative sovereignty its intention was to follow this policy without limit of time and, in order to promote the maintenance of this policy after the transition period, it agrees and hopes to ensure its continuation by the conclusion of bilateral treaties with the various Powers before the transition period ends.'[1]

Other delegations clearly understood the matter in this way, as is illustrated by the terms of the Italian Delegate's acceptance of the Egyptian declaration,

> 'according to which Egypt will not adopt, after the transition period, a policy of discrimination to the detriment of foreigners, and that treaties of establishment *in this sense* may be concluded between Egypt and other Powers'.[2]

To the Belgian Delegate, the Egyptian Delegate said that 'the Egyptian Government is ready to sign treaties of establishment and commerce or treaties of friendship with foreign Powers on the basis of equality and reciprocity', and he agreed that his declaration about non-discrimination in the future should be recorded in the final Act of the Conference. Its general sense was to be that 'Egypt, though limiting to a period of twelve years its legal obligation of non-discrimination, has no intention after this period of pursuing a policy of discrimination to the detriment of foreigners and that it is fully prepared to conclude treaties of establishment, commerce and friendship with the various Powers'. The Declaration eventually made was in the following terms:

> '2. Non-discrimination Rule.
>
> 'With reference to Article 2, paragraph 2 of the Convention and the Protocol relating thereto, the fact that the effect of the non-discrimination rule referred to in the above-mentioned Article 2 is limited to the duration of the transition period, does not imply any intention on the part of the Royal Egyptian Government to pursue thereafter in this matter any contrary policy of discrimination against foreigners. The Royal Egyptian Government is, moreover, prepared to conclude Establishment Treaties and Treaties of Friendship with the various Powers.'

The essence of the agreement so reached concerning non-discrimination was that Egypt was *legally* bound during the transition period of twelve years not to discriminate against foreigners; that Egypt would be prepared to enter into treaty obligations legally binding it not to discriminate against foreigners after that period, on a basis of reciprocity; and that whether treaties to that effect were concluded or not, Egypt was morally bound, as part of the consideration offered for the abolition of the Capitulations, not to discriminate against foreigners after that period, provided other Powers did not discriminate against Egyptians. In other words, the Egyptian Government formally declared in unequivocal terms its readiness, as part of a bargain to the making of which it attached supreme importance, to bind itself legally by bilateral treaties with any of the Powers prepared to accept the like obligation towards Egypt, not to discriminate against the nationals of those Powers. Naturally a Power which was not prepared to offer to accord national treatment to Egyptian nationals could not claim the benefit of the Egyptian undertaking, but any Power that was prepared to accord national treatment to Egyptian nationals in matters normally covered by treaties of friendship, commerce, and establishment was clearly entitled to expect the Egyptian Government to conclude with it a treaty according its nationals the same treatment in Egypt in those matters as is accorded Egyptians. That owing to the war of 1939 no such treaties have yet been concluded does not affect in international relations based on good faith the validity of the Agreement made at Montreux, and it remains to be seen whether the treaties of establishment which the Egyptian Government is now proposing to negotiate with the former Capitulatory Powers will embody in its full extent the principle of non-discrimination enshrined in the Acts of Montreux.

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[1] *Green Book*, p. 88.

[2] Ibid., p. 93.

What the principle of non-discrimination meant was fully discussed at the Conference. It was agreed that it meant non-discrimination in fact as well as in law, and that it was intended to be observed in the spirit as well as the letter. Equally it was agreed that the mere fact that a law, applicable in terms to all inhabitants of Egypt, happened in the conditions of Egypt to bear more hardly upon foreigners than upon the bulk of the native population, would not necessarily mean that it involved discrimination against foreigners. The Egyptian Delegation gave some examples of laws which the other Delegations agreed could not properly be described as discriminatory. An obvious example was a law requiring visas on foreigners' passports. A law increasing taxes on stock-exchange transactions could not be called discriminatory even though the majority of operators were foreigners, nor a law imposing an income tax from which most Egyptians, being cultivators and paying only land tax, might be exempt. The same would be true of laws requiring certain qualifications for the exercise of some professions, e.g. the law or medicine. (To set anxieties at rest the

Egyptian Delegation added that the Egyptian Government had no intention for the moment of imposing a tax on income. It is nevertheless a fact that within a few months of the entry into force of the Convention a proposal for an income tax was before Parliament and within a year it had become law.)

The result of the discussion as to the meaning of non-discrimination was the inclusion of the following article in the Protocol to the Convention:

> I
>
> 'It is understood that the provisions of Article 2, paragraph 2 of the Convention relating to the non-discrimination rule and applicable during the transition period must be interpreted in the light of international practice relating to undertakings of that nature between countries enjoying legislative sovereignty.'

The Drafting and Co-ordinating Committee of the Conference in its authoritative gloss upon the Convention and the other documents included in the Acts of the Conference explained that the discussion which is briefly recorded above made it desirable to insert this special text on the interpretation of the non-discrimination clause. In its observations on Article 2 of the Convention it included the following:

> 'In the framing of this text, account was taken of the fact that among the principles generally adopted in modern legislations, which are referred to in paragraph 2 of the text, should certainly be included the rule concerning respect for legally acquired rights.
>
> 'It is, moreover, understood that the non-discrimination rule set forth in paragraph 2 of the new text, although considered more especially in regard to its application to fiscal matters, is a rule of a general nature.
>
> 'The term "legislation" used in Article 2 is to be taken in the wide sense which it bears in English.'

What, therefore, the Egyptian Government undertook as a legal obligation during the transition period (an obligation which could be indefinitely extended by bilateral agreements with any of the Powers prepared to offer Egyptian nationals similar treatment) was not to discriminate against foreigners and that this obligation was to be interpreted in the light of international practice. As was pointed out in the 1938 volume of this *Year Book* (pp. 166–7):

> ' "International practice", which is referred to here for the purposes of interpretation, covers (*a*) the actual application of nondiscrimination undertakings by states enjoying legislative sovereignty which are subject to them, and the representations made by other states enjoying the benefits of such undertakings, and (*b*) decisions of international tribunals expounding the effect of such provisions, in particular the Advisory Opinion of the Permanent Court of International Justice in the case relating to the treatment of Polish nationals in Danzig (Series A/B 44). A consideration of this international practice leads to the conclusions (i) that non-discrimination means non-discrimination in fact as well as in law; artfully designed conditions nominally applicable to all but in fact burdening only foreigners are contrary to it, though the mere fact that

a provision such as a tax hits foreigners chiefly does not alone make it discriminatory, (ii) non-discrimination does not mean the same thing as complete equality with nationals in every sphere.'

During the transition period the Egyptian Government made a number of laws bearing particularly on foreigners. Among those which could probably not be objected to as infringing the non-discrimination rule are Law No. 49 of 1940 regarding passports and the residence of foreigners in Egypt and the Regulation of 21 October 1947 prescribing identity cards to be carried by foreigners, as also laws imposing an income tax and other taxes of general application. Another example of this class is the law (No. 111 of 1945) prohibiting foreigners from acquiring land in the frontier districts of the country, although the large extent of these districts might be regarded as greater than the *rationale* of national defence justifies and as therefore possibly affording ground for complaint that the law, going beyond the needs of the case, amounted to discrimination against foreigners contrary to Article 2 of the Convention. An undertaking not to discriminate against foreigners does not in international practice and law deprive a Government of the right to take measures reasonably necessary for the defence of the country, even though they be directed against foreigners as such. On the other hand, measures not reasonably necessary in all the circumstances of the case, when judged by the standard of international practice, would infringe such an undertaking. In this case it is believed that no government protested against the enactment of the law in question.

The law (No. 98 of 1944) restricting practice before the Egyptian National Courts to Egyptian nationals probably conflicts with the non-discrimination rule.[1] Certainly it is not uncommon, and indeed it may be said to be the general practice of governments, to restrict practice of the legal profession to nationals, but this is not to say that where an express undertaking has been given not to discriminate against foreigners, everything may nevertheless be done which governments not bound by such an undertaking may do. How close responsible Egyptian opinion has come to taking this denigrating view of Article 2 of the Montreux Convention will be seen in a moment.

Another law passed during the transition period and having the most serious adverse effect on the situation of foreigners in Egypt is the Companies Law of 1947 (No. 138 of 1947). This law requires companies formed in Egypt to have a minimum of 51 per cent. of Egyptian shareholders, a substantial minimum proportion of Egyptian directors (40 per cent.) and, more important, minimum percentages of Egyptian employees and workmen receiving minimum percentages of the total payroll. The minima for employment, and for salaries and wages, rise to very high percentages over a period of three years and the necessarily intended effect of encouraging the employment of Egyptians at the expense of foreigners has already become apparent. Moreover, in spite of the absence of express provision, the law has been applied so far as employment and salaries and wages are concerned to foreign-incorporated companies and their branches in Egypt. In Egypt, as elsewhere in the modern world, a very large part of the commerce and industry of the country is carried on by companies which supply a high proportion of the opportunities for earning a livelihood. The consequence has been that the opportunities for foreigners in Egypt to make a living have been gravely restricted and very real discrimination in fact is being practised against them under this law which, in form, purports to be non-discriminatory and to do no more in this respect than regulate the employment practices of Egyptian companies. When it is recalled that a very substantial proportion of the foreigners living in Egypt have been born there and have no other home, the practical hardships of the discrimination against them is the more apparent.

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[1] An exception in favour of advocates having acquired the right to practise before the Mixed Courts was made by Law No. 51 of 1949. All these advocates are transferred to the roll of advocates of the National Bar.

The policy and effect of this law is to be contrasted with the categorical assurances given by the Egyptian Delegation at Montreux that the.rule of non-discrimination would be respected in spirit as in the letter, and that there was no reason to fear that the Egyptian Government would have recourse to any devices to evade it.[1]

No party to the Montreux Convention has so far submitted to the International Court of Justice the question whether the Companies Law of 1947 infringes the non-discrimination rule, but it is thought that under Articles 2 and 13 of that Convention the question could be submitted to that Court even at this late date.

In the case of *Truax and Arizona* v. *Raich* in 1915, the United States Supreme Court held invalid a law of the State of Arizona requiring all employers to employ a minimum percentage of United States citizens. It took the view that an alien lawfully in the country was denied the equal protection of the law by a statute of that kind as it deprived him of an equal right to be employed and so to seek a livelihood in the ordinary pursuits of the community. Indeed, it held, the limitation of this right would render nugatory the right accorded him by the United States to enter and live in the country, for if a minimum percentage of American citizens to be employed might be prescribed by one statute other statutes could raise that percentage progressively until employment in the ordinary pursuits of the community would be practically denied to lawful, though alien, residents, and without a livelihood their right to reside would be illusory.

The legal position in Egypt during the transition period was not exactly

[1] *Green Book*, p. 89.

the same as that in the United States, nor is it to-day, but the practical discriminatory effect of the Egyptian legislation is exactly the same as that prevented in the United States by the decision of the Supreme Court.

In Egypt, because at the time the Egyptian Constitution was promulgated (in 1923) foreigners enjoyed the large protection of the Capitulations, the Egyptian Constitution expressly guaranteed constitutional rights only to Egyptians (Title II) and so the Constitution still stands.[1] To-day, therefore, as then, the foreigner in Egypt must rely for the enjoyment of reasonable treatment on treaty provisions, for reasonable treatment means in modern practice something more than the very limited and, indeed, ill-defined security afforded him by international law. The Egyptian Constitution does, however, provide (Art. 154) that it cannot be so applied as to 'infringe Egypt's obligations towards foreign states, or the rights acquired in Egypt by foreigners by virtue of laws, treaties or recognized custom'. The domestic legal basis, therefore, exists for ensuring the recognition of the rights of foreigners in Egypt however legally acquired.

It was Article 154 of the Egyptian Constitution which led to the consideration by the Senate Committee on Constitutional Questions of the constitutionality of a draft law prohibiting foreigners from acquiring agricultural land in Egypt.[2] The question was whether the draft law was in conformity with the Montreux Convention. The Committee reached the conclusion that it was, by a process of reasoning which reduced the meaning of the second paragraph of Article 2 of the Convention to nothing, and indicated that at least some responsible opinion in Egypt regarded the assurances of non-discrimination after 14 October 1949 as having not even any moral force.

From the legal point of view, the vice in the Committee's report was the conclusion that the second paragraph of the Article provided only that Egyptian legislation would not discriminate against foreigners in any way forbidden by international law. This conclusion completely ignored the provision in the Protocol that the second paragraph of Article 2 'must be interpreted in the light of international practice relating to undertakings of that nature between countries enjoying legislative sovereignty'. The Protocol plainly provided that the paragraph was to be interpreted in accordance with the meaning to be attached to such an undertaking expressly given in a treaty between independent states, and not in accordance with the obligations to one another under international law of states which have not entered into such a treaty engagement. Had the Committee's view been right, both the second and third paragraphs of Article 2 and also Article 1 of the Protocol would have been otiose, for the first paragraph of the article already in recognizing Egyptian legislative sovereignty over foreigners saved the application of the principles of international law. It was, therefore, entirely irrelevant to the matter in hand to refer to the practice of many countries which restrict or prohibit the acquisition of land by foreigners. What it was relevant to consider was whether a state which had expressly undertaken, though in general terms, not to discriminate against foreigners would be nevertheless entitled to prohibit foreigners from acquiring a generally innocuous useful commodity like agricultural land, quite irrespective of what a state not bound by such an undertaking might or might not be entitled to prohibit under the rules of international law. It is thought that such a prohibition imposed on foreigners in Egypt during the transition period would have been a breach of the Montreux Convention. The Committee considered the provision in the draft postponing the entry into force of the law until 15 October 1949, to be due to 'an excess of caution'. Nevertheless, in the event, the Committee concluded that the letters exchanged at Montreux with Greece, France, and Italy, assuring their nationals most-favoured-nation treatment in Egypt during the transition period, and the letters exchanged with the United States, United Kingdom, Spain, France, Greece, and Italy concerning their educational and other institutions in Egypt, bound Egypt not to apply such a law during that period. Its main conclusion, however, stood, namely, that discrimination against foreigners during the transition period in the matter of acquiring agricultural land in Egypt was not an infringement of the non-discrimination rule in the Montreux Convention, and not being in conflict with a treaty obligation was therefore constitutionally unobjectionable. If such discrimination was regarded in Egypt as being consistent with the *legal* obligation undertaken for the transition period, it is a question how much weight will be allowed the assurance given at Montreux as part of the bargain for the abolition of the Capitulations that after the transition period Egypt would not follow a contrary policy of discrimination and would be prepared to assure the continuance of non-discrimination for the future in establishment treaties concluded on the basis of equality and reciprocity. The question is whether countries like the United Kingdom, which accord, on the whole, national treatment to foreigners and are prepared to accept by treaty the legal obligation to accord such treatment to Egyptians, will be able to obtain that treatment for their own nationals in Egypt in accordance with the undertakings given at Montreux.

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[1] *State Papers*, vol. 118, pp. 198–215.

[2] The Committee's report dated 10 January 1949 was published in *Journal des Tribunaux Mixtes*, No. 4081 of 30/31 May 1949.

The foreign population established in Egypt will wish to have confirmed their acquired right of residence and their right to earn a living like Egyptians in the ordinary pursuits of the community. They will desire to be secured against deportation except in individual cases and for serious reasons not including indigence, which is one of the hazards of life in any community. Those not so far established in Egypt will expect to have the right to enter the country for legitimate reasons, including business, unless they can be shown in individual cases to be objectionable. If permitted to reside there for a reasonable length of time and so to identify themselves with the life of Egypt, they will wish to be assured of the right to continue to reside there. Foreigners, including foreign companies, will attach importance to being assured of non-discriminatory treatment as to taxation and the conditions in which they may pursue their business and other interests, including the ownership of property. All foreigners will desire to be assured of access to the Courts with the aid of lawyers of their own choice on the same conditions as Egyptians. They will wish to be exempted from compulsory national service and to have the right to freedom of worship and assurances for the continued existence and effective operation of their educational, medical, and charitable institutions. On the terms which can be included in establishment and other treaties, negotiated on a basis of equality and reciprocity, will depend the future development of commercial and cultural intercourse between Egypt and the countries of the Western World among which there is a general recognition of the mutual advantage of the greatest possible exchange of ideas, information, goods, and services through the medium of their nationals freely admitted for these purposes into each other's territory.

Note

The abolition of the Capitulations at Montreux and the extension of the jurisdiction of the Mixed Courts during the transition period required a certain amount of Egyptian legislation to give effect to the changes so made, which are explained in the article at pp. 161 ff. of the 1938 volume of this *Year Book*. A series of Decree-Laws, Nos. 88 to 95, of 11 October 1937, was consequently enacted.

The first (No. 88) defined 'foreigners' for the purpose of Mixed Court jurisdiction to include, besides the nationals of Parties to the Montreux Convention, the nationals of Austria, Czechoslovakia, Germany, Hungary, Poland, Roumania, Switzerland, and Yugoslavia—this in accordance with the first paragraph of the Egyptian Government's Declaration at the Conference.

The second Decree-Law (No. 89) set out the law to be applied by the Mixed Courts, namely, the new Penal Code (promulgated by Law No. 58 of 1937), the new Code of Criminal Procedure (promulgated by Law No. 57 of 1937), the Mixed Civil Code, the Mixed Code of Civil and Commercial Procedure, the Mixed Commercial Code and the Mixed Maritime Code, as well as *Egyptian laws and regulations in force on* 15 *October* 1937. It is the words in italics which were the corollary of the abolition of the Capitulations, for they brought into force as regards foreigners all Egyptian legislation, including what had, until 15 October 1937, not been approved for application to them. At the same time the Decree-Law swept away a large miscellany of special rules deriving from Capitulations, including many of those touching foreign diplomatic and consular agents and their privileges.

By Decree-Law No. 90 the National Courts were given jurisdiction in all criminal, civil, and commercial matters not cognizable by the Mixed Courts, with the automatic result that on the termination of the Mixed Courts full jurisdiction in these fields would accrue to the National Courts, as it has now done.

Decree-Law No. 91 was designed to prevent conflicts of jurisdiction in matters of personal status. It adopted the definition in the new Mixed Court *Règlement* (Art. 28) for the purposes of the Egyptian personal status tribunals and gave legislative effect to the provision in the fourth paragraph of Article 25 of the *Règlement* that foreigners belonging to religions for which such Egyptian tribunals existed should continue to be subject to their jurisdiction. The law did not expressly limit the jurisdiction of these tribunals so far as foreigners were concerned to those who *in the past* had been subject to them, as was provided by the Montreux Convention, but, using the words 'shall continue', it has been so interpreted, and it is clear that the National Civil Tribunals had jurisdiction during the transition period over non-capitulatory foreigners in matters of personal status and to-day have jurisdiction over all foreigners who did not before the Montreux Convention have the right to resort to the Egyptian personal status tribunals in these matters.

Decree-Laws Nos. 92 and 93 dealt with details of the Penal Code and Code of Civil and Commercial Procedure.

Decree-Law No. 94 added to the Code of Civil and Commercial Procedure a new Title V concerning procedure in personal status cases, but based upon procedure in continental systems of law. The retention by the United Kingdom and the United States of their Consular Courts for personal status cases of their nationals during the transition period, obviated for the time being the inconvenience to their nationals of a code of procedure which took no account of such peculiarly Anglo-American legal institutions as the executor and trusts. Towards the end of the period great care was taken by the scholarly draftsmen of a new Code of Civil and Commercial Procedure to study the procedural measures necessary for giving effect to peculiarly Anglo-American concepts in the field of personal status, but by the end of the period a satisfactory draft had not been completed, so that Law No. 77 of 1949 which brought into force a new Code of Civil and Commercial Procedure retained in force Title V added to the old Mixed Code in 1937 by Decree-Law No. 94 of that year. It remains to be seen whether, pending the promulgation of new provisions in the place of that Title, the Egyptian National Courts will find ways and means of giving substantial effect to the overriding provision of the Civil Code that in matters of personal status of foreigners their national law shall apply.

Decree-Law No. 95 provided explicitly that all municipal and local taxes should be payable by all inhabitants of Egypt without distinction, thus giving effect in this sphere to the new-found freedom of the Egyptian Government to subject foreigners to all Egyptian legislation and notably that of a fiscal nature.

Apart from these laws, administrative measures were taken for the progressive increase in the proportion of Egyptian judges in the Mixed Courts (other than the Court of Appeal) and for the retention in office of existing personnel and the creation of a new *cadre*.

As was pointed out in the Note on the termination of the Egyptian Mixed Courts at pp. 387 ff. of the 1948 volume of this *Year Book*, the arrangements made at Montreux were so comprehensive and their operation so nearly automatic that there is little of general legal interest to add to the accounts that have already appeared in this *Year Book*. Nevertheless, as the transition period approached its end, it became apparent that some legislation was necessary. Reference has been made in the present article to the long-considered proposals for a new Prison Law, which has still not been enacted.[1]

[1] See above, p. 362.

In the realm of civil law a new Civil Code appeared to be desirable, while considerable effort was devoted to the preparation of new Commercial and Maritime Codes. Neither of the latter has yet reached the statute book, but a new Civil Code was enacted by Law No. 131 of 16 July 1948, and it came into force on 15 October 1949 (see below).

The other major piece of legislation brought into force on 15 October 1949 is the new Civil and Commercial Procedure Code which, however, does not call for detailed comment pending the promulgation of the portion (still being drafted) concerning personal status cases of foreigners.

Other legislation required to give effect to the Montreux arrangements, particularly in relation to the end of the transition period, was duly enacted. Of this the most obviously necessary enactment was Law No. 115 of 1948 abolishing the Mixed and Consular Courts and remitting cases pending before them at the end of the transition period to the National Courts.

By Law No. 64 of 1949 a new Court of Appeal was established at Mansourah so that from 15 October 1949 there would be with those already existing at Cairo, Alexandria, and Assiut, four Courts of Appeal in the national system.

By Law No. 79 of 1949 provision was made for the transfer to the National system from 15 October 1949 of judges and officials of the Mixed Courts of Egyptian nationality, without prejudice to any existing salary rights superior to those enjoyed by the judges and officials of the National Courts.

By Law No. 51 of 1949 provision was made for the transfer from 15 October 1949 to the National Bar of members of the Mixed Bar, without restriction as to nationality, notwithstanding the provisions of Law No. 98 of 1944 confining membership of the National Bar to Egyptian nationals.

By Law No. 126 of 1949 provision was made for moderate compensation of foreign officials of the Mixed Courts whose services were to be dispensed with on the termination of those Courts.

The two laws last mentioned were enacted in performance of the undertakings given by the Egyptian Government in paragraph 7 of its Declaration at Montreux.

The discussion which follows is intended to indicate some of the problems likely to arise, so far as foreigners are concerned, from the jurisdictional changes following upon the termination of the Mixed and Consular Courts.

FOREIGN ARMED FORCES: IMMUNITY FROM SUPERVISORY JURISDICTION[1]

By G. P. BARTON, B.A., LL.M.

I. *Introductory*

THE present article is concerned with the exercise of supervisory—as distinguished from criminal—jurisdiction by the courts of a state which receives in its territory the visiting forces of another state. Criminal jurisdiction is exercised whenever the courts of a state take cognizance of an offence against the penal law of that state. This definition excludes the pre-trial activities of the police and other law enforcement agencies of a state in detecting, apprehending, and prosecuting offenders against the penal law. The policeman is an official of the executive, not of the judiciary. Thus, a member of a visiting force is subject to the criminal jurisdiction of the local state only when he is liable to be tried in its courts for offences against its penal law.

The problem is different with regard to what may be called supervisory jurisdiction. It is an axiom of military law that the members of the armed forces of a state are subject to that law wherever they may be. This means, for instance, that a member of the French forces who offends against French military law by disobeying a lawful command in France also offends against that law by disobeying a lawful command outside France. This is not a characteristic of military law alone. But the axiom of military law means more than this: it means that a member of the French forces who disobeys a lawful command outside France not only renders himself liable to punishment on his return to his home country. He may also be arrested, tried, and punished *outside* France for the offence. Military law, like civil law, follows those subject to it wherever they may be; but it is only military law that carries with it the machinery to enforce its sanctions. In remote regions of the earth and in territory under military occupation for the purpose of conducting war operations there is no difficulty in making that machinery work. In the territory of an ally and far from the zone of operations, however, the service courts and authorities of an armed force are faced with problems of some complexity in exercising the powers given them by their military law.

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[1] The following abbreviations, apart from those commonly used, appear throughout this article: *A.J.—American Journal of International Law; Annual Digest—Annual Digest of Public International Law Cases*, 1919–32, *Annual Digest and Reports of Public International Law Cases*, 1933–date; *Bulletin—Bulletin de Législation et de Jurisprudence Égyptiennes; Clunet—Journal du Droit International fondé par E. Clunet; Dalloz—Jurisprudence Générale, Recueil Périodique et Critique fondé par MM. Dalloz; D.L.R.—Dominion Law Reports* (Canada); *E.A.S.—Department of State Executive Agreement Series* (United States of America); *F.C.R.—Federal Court Reports* (India); *J.O.—Journal Officiel de la République Française*; P.C.—Privy Council (Canada); *P.L.R.—Palestine Law Reports; S.R.N.S.W.—State Reports, New South Wales*; S.R.—Statutory Regulation (Australia or New Zealand); *S.R. & O.—Statutory Rules and Orders* (United Kingdom); *U.N.T.S.—United Nations Treaty Series.*

These problems are best illustrated by examples. X is a captain of a division of the Swiss Army which at the invitation and with the consent of the British Government is stationed in England. Y, a private in a company under the command of X, disobeys an order given to him by X. According to Swiss law the order is not an unlawful one. Consequently, under the provisions of the Swiss Military Code X may lawfully have Y summarily arrested and detained pending court-martial proceedings against him for disobedience of that order. X has Y arrested accordingly. On behalf of Y a petition for the issue of a writ of habeas corpus is addressed to the King's Bench Division calling on X to justify the detention of Y. The only return to the writ that X can make is that Y is detained under the provisions of the Swiss Military Code. Is this a sufficient return? Clearly not, because X has not shown that the detention is justifiable according to the law of England. If the English courts were to recognize such a return as sufficient, they would be enforcing a foreign penal law, a course which they have consistently refused to follow.[1] It would seem, therefore, that the writ would issue. Similarly, if Y were being detained pursuant to a sentence of a Swiss court martial, he would be able to regain his liberty. Not only would Y be able to avail himself of the remedy of habeas corpus, but there would also seem to be no principle of English law to prevent him from bringing a civil action for assault, battery, or wrongful arrest or false imprisonment, as the case may be, against X in the English courts.[2] Further, if the Swiss courts martial were recognized as inferior judicial tribunals by English law, and if Y could show some excess of jurisdiction or other irregularity in the proceedings of the court martial trying him, it would appear that the writs of prohibition or *certiorari* would be available as an effective means of preventing the apprehended wrong. By exercising jurisdiction in these ways the English courts would be supervising the exercise of the powers given to the service courts and authorities of the visiting force in matters of discipline and internal administration by the law of the state to which they belong.

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[1] For an American decision dealing with this point in connection with visiting forces, see *Tucker* v. *Alexandroff* (1902), 183 U.S. 425 at p. 434, 46 U.S. Sup. Ct. Rep. (L. Ed.) 264 at p. 269.

[2] *R.* v. *Navratil, Annual Digest*, 1919–42, Supplementary volume, Case No. 85 at p. 164, *per* Cassels J.: 'It would have not been right, without some authority, for there to be in this country armed forces which were administering punishment, punishment which might well have involved the liberty of members of those armed forces, unless there was authority upon the part of those who administered such punishments so to do. Such punishments might have involved even corporal punishment, and it might well be that an individual who was imprisoned by reason of an order of the Military Authorities of a foreign armed force, would have a right of action in our Courts for false imprisonment upon the ground that there had been no authority so to imprison.'

It is that jurisdiction to which, therefore, the adjective 'supervisory' may properly be applied.

The term 'visiting' when used to describe an armed force implies that this force has come to and sojourns on the territory of the local state with its consent and at its invitation. It is not unknown for such consent to be given reluctantly. But we are here concerned only with the position of a foreign force which visits the local state with its full and free consent and pursuant to its unsolicited invitation.[1] It will therefore sometimes be necessary, when assessing the evidentiary value to be accorded to the practice of states and decisions of courts in this matter, to scrutinize carefully the circumstances in which the visit of the foreign force took place.

Finally, the meaning of the word 'forces' will include the military, naval, and air forces of a foreign state on the land territory of the local state. Accordingly, the position of forces on the warships or in the aeroplanes of a foreign state, which may be in the territorial waters or, in the case of the latter, in the territorial airspace of the local state, is outside the purview of this article. It includes, on the other hand, the exercise of jurisdiction over air force personnel on ground and naval personnel ashore.

The *locus classicus* of jurisprudence on the question of jurisdictional immunities of foreign armed forces is the dictum of Chief Justice Marshall in the well-known case of *The Schooner Exchange* v. *M'Faddon*.[2] There, for the first time, a judicial pronouncement was made concerning the relationships between a visiting armed force and the local authorities. It would be difficult to find any writing on the subject which does not make express or implied use of the dictum. It is believed that the remarks of Chief Justice Marshall are relevant primarily to the relationships between a visiting force and the supervisory jurisdiction of the local courts, and that great caution should be used in extending them to include, *inter alia*, the relationship between a visiting force and the local criminal jurisdiction.

The question at issue in the case was whether the title of a foreign state to a warship could be impugned in the courts of the country the ship was visiting. The schooner *Exchange* had originally been the property of M'Faddon and Greetham when she sailed from Baltimore on 27 October 1810 for Spain, but while on the high seas she was seized by certain persons acting under the orders and decrees of Napoleon, Emperor of France, with whom the United States of America was at peace. She was then incorporated in the French naval forces under the name *Balaou No.* 5. Some time later, owing to rough weather, she was forced to put into Philadelphia in the state of Pennsylvania for repairs. While there she was detained by a process of attachment issued upon the prayer of M'Faddon and Greetham, who sought an order for the return of the ship to themselves. The Supreme Court of the United States of America, to which the case eventually came on appeal, unanimously held that the libel should be dismissed, on the ground that a state must be deemed to waive the exercise of the jurisdiction of its courts to decide questions relating to the title of ships in cases where the ship, the title to which is in dispute, is a part of the naval forces of a friendly foreign state. Had the court not resorted to analogy there would have been no occasion to mention the case of jurisdiction over visiting forces. However, the Court referred to 'a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation';[1] and in this class it placed the case of foreign troops who have been granted a right of passage. Of them it said:

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[1] Cf. Exchange of Notes between the Governments of China and the United States of America constituting an Agreement relating to the presence of the armed forces of the United States on Chinese territory, 29 August and 3 September 1947: *U.N.T.S.*, vol. ix, No. 126 at p. 94, Note from Political Vice-Minister of China: '. . . I have the honour, on behalf of my Government, to state that all armed forces of the United States now stationed in China are so stationed with the consent of the Chinese Government.'

[2] (1812), 7 Cranch 116, 3 U.S. Sup. Ct. Rep. (L. Ed.) 287.

> 'A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, when he allows the troops of a foreign prince to pass through his dominions.
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> 'In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the Sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.'[2]

In view of the importance which subsequent writers have attached to these words it is necessary to consider them in some detail.

It will be noticed that the Chief Justice nowhere referred to the case of troops who have been granted the right to sojourn in territory. His remarks therefore do not apply expressly to them. We have, by definition,[3] confined our attention to jurisdiction over forces who have been invited to enter and sojourn on territory. It would seem, therefore, that the dictum in *The Schooner Exchange* v. *M'Faddon*[4] is not relevant to the problem discussed in the present article. However, this may be too facile a way of dismissing a case which has been treated with such respect in subsequent considerations of the question of jurisdiction over forces stationed on national territory with the consent of the local sovereign. There are persuasive reasons of convenience urging the acceptance of the words of Chief Justice Marshall as if they were applicable to the case of such troops.[1]

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[1] 7 Cranch 116, at p. 137, and 3 U.S. Sup. Ct. Rep. (L. Ed.) 287, at p. 294.

[2] Ibid., at pp. 139–40 and pp. 294–5 respectively.

[3] See above, p. 382.

[4] (1812), 7 Cranch 116 at pp. 139–40.

Whether the above quoted passage is or is not *obiter* is a controversy which it is not intended here to pursue. This does not preclude us from assessing the weight to be given to the passage. A learned American writer has asserted that it is indispensable to the logic of the opinion.[2] Whether this is so may perhaps be doubted. The statement is but an example of a basic proposition which, if sound, would support the conclusion reached by the Court. That basic proposition upon which the argument of the Court was erected was that,(since all states are equal, it is to be presumed that the absolute jurisdiction of one state does not contemplate the sovereign rights of another state as its object. The next step in the argument was to show that the rights over the schooner *Exchange* constituted the sovereign rights of another state. It is a moot point whether that could be taken without the aid of the analogy of the persons of sovereigns, ambassadors, and troops in passage. Analogies are apt to be controversial boomerangs, as the United States Attorney found in argument and Chief Justice Marshall in his judgment in this very case. Both mentioned the analogy of troops in passage and observed that these were entitled to immunity only when express consent to their passage had been given. The flaw in the analogy was seized on by Counsel for the respondents.[3] He pointed out that the schooner *Exchange* had not entered Philadelphia harbour with the express consent of the United States of America and on analogy, therefore, she was not entitled to immunity) The example of troops in passage was, accordingly, introduced into his judgment by the learned Chief Justice only to be immediately distinguished from the case before him. The value of the passage quoted is further lessened by the unfortunate lack of authority adduced in support of it.

What did Chief Justice Marshall mean when he used the term 'jurisdiction'? It is reasonable to suppose that he had in mind a type of jurisdiction the exercise of which by the courts of the local state would have results similar to those caused by the exercise of jurisdiction over the schooner

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[1] It is difficult to agree with the interpretation of Chief Justice Marshall's dictum by the Supreme Court of the United States of America in the two subsequent cases of *Coleman* v. *Tennessee* (1879), 97 U.S. 509, 24 U.S. Sup. Ct. Rep. (L. Ed.) 1119, and *Dow* v. *Johnson* (1880), 10 Otto 158, 25 U.S. Sup. Ct. Rep. (L. Ed.) 632. Mr. Justice Field, who delivered the judgment of the Court in both cases, said in the latter (at p. 635 of the Law Edition): 'As was observed in the recent case of *Coleman* v. *Tennessee*, it is well settled that a foreign army, permitted to march through a friendly country, *or to be stationed in it* by the authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*.' (Italics added.)

[2] *A.J.*, 36 (1942), p. 541. But see Ziegler, *The International Law of John Marshall* (1939), p. 81.

[3] (1812), 7 Cranch 116 at p. 131, 3 U.S. Sup. Ct. Rep. (L. Ed.) 287 at p. 292.

Exchange. The exercise of jurisdiction over the schooner *Exchange* would result in the complete withdrawal of the ship from the French naval forces. That Chief Justice Marshall was referring to this kind of jurisdiction when he mentioned the case of troops in passage emerges from a sentence in the above quotation. He said: 'By exercising (jurisdiction), the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation . . . would be withdrawn from the control of the Sovereign. . . .'[1]

This view finds judicial support in the Australian case of *Wright* v. *Cantrell*.[2] There, in a judgment of characteristic lucidity, the late Chief Justice of New South Wales stated his opinion

> 'that what the learned judge [i.e. Marshall C.J.] had in mind was exercise of jurisdiction which would prevent the troops from acting as a force—something analogous to preventing a ship-of-war from being in a position to act as such, including interference by local Courts with the maintenance of discipline—not exercise of jurisdiction over individual soldiers in respect of liabilities incurred or wrongs done perhaps out of all connection with their military duties.'[3]

Clearly, the jurisdiction the exercise of which would interfere with the maintenance of discipline and prohibit the foreign general from using 'that discipline and inflicting those punishments which the government of his army may require' is supervisory jurisdiction. To give the members of visiting forces access to this jurisdiction of the local courts would mean the frustration of the exercise of disciplinary powers by the foreign authorities. On the other hand, to suggest that the exercise of the local criminal jurisdiction over a visiting force would necessarily impair its effectiveness is at once to under-estimate the number of its law-abiding members and to over-estimate the contribution each soldier makes to its general efficiency.

In *Tucker* v. *Alexandroff*[4] the Supreme Court of the United States of America had occasion to discuss the exercise of supervisory jurisdiction over some Russian naval forces visiting America. The respondent, Alexandroff, was a member of a Russian naval party which had entered the United States of America with the consent of its Government for the purpose of taking possession of and manning a ship which was being constructed for the Russian navy by a firm of private contractors in Philadelphia. Before the ship had been accepted by the Russian Government under the terms of the building contract and before Alexandroff had set foot on the ship, he deserted and attempted to become naturalized as a citizen of the United States of America. The appellant, Tucker, who was Vice-Consul for Russia in Philadelphia, requested the arrest of Alexandroff in accordance with Article IX of the Russo-American Treaty of 1832 which provided:

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[1] 7 Cranch 116, at pp. 139–40, and 3 U.S. Sup. Ct. Rep. (L. Ed.) 287, at pp. 294–5.

[2] (1943), 44 *S.R.N.S.W.* 45, *Annual Digest*, 1943–5, Case No. 37.

[3] 44 *S.R.N.S.W.* 45, at p. 49.

[4] (1902), 183 U.S. 425, 46 U.S. Sup. Ct. Rep. (L. Ed.) 264.

> ‘. . . vice-consuls . . . are authorised to require the assistance of the local authorities for the search, arrest, detention, and imprisonment of deserters from the ships of war . . . of their country.’

After his arrest Alexandroff applied for a writ of habeas corpus to test the validity of his detention.>The main question at issue concerned points of interpretation of the words ‘ships of war’ and ‘deserters from’ in the treaty. However,<a subsidiary argument justifying the detention of Alexandroff was put forward to the effect that, even if the treaty was not applicable, the authorities of the naval party could exercise their disciplinary powers over Alexandroff by arresting him for desertion themselves or through the medium of the local authorities. In such cases, it was argued, the local courts must waive their jurisdiction to inquire into the validity of the detention by the visiting authorities>. In the absence of treaty obligation or municipal enactment the Court held that the arrest of a deserter by the local authorities could not be justified, but it accepted with qualifications the argument based on arrest by the visiting authorities themselves. Mr. Justice Brown, who delivered the opinion of the Court, said:

> ‘The case, (i.e. *Schooner "Exchange"* v. *M'Faddon*) however, is not authority for the proposition that, if the crews of such vessels, or the members of such military force, actually desert and scatter themselves through the country, their officers are, in the absence of treaty stipulation, authorized to call upon the local authorities for their reclamation. While we have no doubt that, under the case above cited, the foreign officer may exercise his accustomed authority for the maintenance of discipline, and perhaps arrest a deserter *dum fervet opus*, and *to that extent this country waives its jurisdiction over the foreign crew or command*, yet if a member of that crew actually escapes from the custody of his officers, he commits no crime against the local government, and it is a grave question whether the local Courts can be called upon to enforce what is in reality the law of a foreign sovereign.’[1] >

The words italicized are a clear recognition by the Court that there is a waiver of supervisory jurisdiction over the visiting force. Neither the case as a whole nor the passage quoted has any bearing on the exercise of criminal jurisdiction over the naval party in general or Alexandroff in particular. It should be remarked, in passing, that the interpretation of Marshall's dictum in *The Schooner Exchange* v. *M'Faddon* adopted in the majority opinion above quoted—an interpretation which is believed to be correct—was shared by the dissenting Justices who differed from their colleagues only on the application of the 1832 treaty to the case before them.

It is proposed to limit the present article to a consideration of the topic under three main heads: (1) the practice of the First World War; (2) the arrangements between the members of the British Commonwealth of Nations; and (3) the practice of the Second World War.

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[1] 183 U.S. 425, at pp. 433–4, and 46 U.S. Sup. Ct. (L. Ed.) 264, at p. 269. Italics added. See also the *Case of the Russian Prisoners*: Forsyth, *Cases and Opinions on Constitutional Law* (1869), p. 468.

II. *The First World War*

(*a*) *France and Belgium*

The reason for the presence of Allied armies on French and Belgian soil from 1914 to 1918 was to wage war together with the French and Belgian armies against the Central European powers, Germany and Austria-Hungary. The nature of the warfare necessitated the creation of so-called sectors or 'zones of operations' to which each Allied army was assigned. Responsibility for the conduct of war operations in a sector, subject to the overriding authority of the High Command, was entrusted to the occupying army. These sectors were close to the main line across which the opposing armies faced each other and consequently there were few French or Belgian inhabitants who still remained in them. It is important to bear this factor in mind in order to gain an adequate appreciation of the arrangements which were made for the exercise of jurisdiction by the authorities of the allied armies. Clunet described the situation as an occupation by consent. He said:

> 'Quant aux armées alliées elles-mêmes, opérant en France, elles occupent *de facto* des portions de territoire. Bien que s'agissant d'une "occupation consentie", plusieurs suites de "l'occupation militaire", en général, en découlent.'[1]

There is no doubt that an army in peaceful occupation of territory can exercise such powers as may be conferred upon it by its military law, subject to agreement with the territorial state. The position of an army of occupation, albeit an occupation by consent, is radically different from that of a visiting force which has no responsibility for the administration of any particular area. The fundamental distinction is that the former possesses and the latter lacks authority over persons who do not belong to it and who reside in the area of occupation. Obviously, therefore, by its very nature, an army of peaceful occupation has complete immunity from the supervisory jurisdiction of the local courts.[2] The question to be considered, however, is whether this complete immunity was taken away wholly or in part by the derogations from the authority of the Allied armies in France and Belgium made from time to time in various agreements. The answer is clear: At no time was any attempt made by the French Government to subordinate the exercise of their powers of discipline and internal administration by the authorities of the Allied armies to the jurisdiction of the French courts. On the contrary, the French Government by executive decrees and the French courts by an ample and generous interpretation of the provisions of French law made every effort not only to implement the exercise of jurisdiction by the authorities of the Allied armies but also to protect these armies from the undesirable activities of civilians. The Allied armies on Belgian territory were in virtually the same position.

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[1] *Clunet*, 45 (1918), p. 516. See also the decision of the Court of Cassation, Mixed Courts of Egypt, in *Malero Manuel* c. *Ministère Public, Annual Digest*, 1943–5, Case No. 42 at p. 160; and the statements made on this point in the House of Commons at Westminster during the debate on the second reading of the United States of America (Visiting Forces) Bill, 1942, *Official Report*, 4 August 1942, vol. 382, cols. 883, 895, 900–1.

[2] A caveat should be entered at this point lest it be thought that we are assimilating the position of the Allied armies on French and Belgian territory in 1914–18 to that of armies of occupation That is not a true description of the status of these armies. It is correct, however, that their powers were regarded as something less than those of an army of occupation by consent. That is to say, any analysis of their status commenced with an examination of the status of *such* an army of occupation. This is clearly illustrated in Chalufour, *Le Statut Juridique des Troupes Alliées pendant la Guerre 1914–1918* (1927), *passim*.

In the 1914–18 war the first derogation from the normal jurisdiction over civilians accorded by international law to an army occupying territory by consent appeared as an exception to the authority of the French army in Belgian territory to punish acts committed against it by civilians in its zone of operations. The Franco-Belgian Agreement of 14 August 1914,[1] which was entered into 'pour mieux assurer la poursuite des actes préjudiciables aux armées des deux nations', is short and worth quoting in full. It provided that:

> 'Les gouvernements français et belge sont d'accord pour appliquer, chacun en ce qui le concerne, le principe suivant lequel chaque armée garde sa juridiction quant aux faits susceptibles de lui nuire, quels que soient les territoires où elle se trouve et la nationalité de l'inculpé. Par dérogation à ce principe, il est entendu que les nationaux belges inculpés d'actes préjudiciables à l'armée française seront livrés aux autorités belges pour être jugés par elles selon les lois de la Belgique: en territoire français, l'armée belge appliquerait éventuellement cette même règle.'[2]

Thus, by this Agreement the authorities of the French army in Belgium would be able to exercise jurisdiction over, say, a Swiss national residing in Belgium who aided the desertion of soldiers from the French army.

Mlle Chalufour states[3] that at a Conference of the French and British military authorities from 19 to 23 March 1915 it was originally proposed that the British courts martial in France should have a similar jurisdiction to that of the French military tribunals in Belgium, namely, 'pour tous actes préjudiciables à l'armée anglaise commis par tous individus à l'exception des nationaux français'. However, the final Anglo-French

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[1] *J.O.*, 4 December 1914; *Dalloz* (1915), vol. iv, p. 25.

[2] There seems to be no support for the statement by Colonel King in *A.J.*, 36 (1942), p. 539, at p. 549, that 'by it, each country recognized the exclusive jurisdiction of the other over the personnel of its own forces'. The Agreement made no mention of 'exclusive jurisdiction' and there is no suggestion that the Belgian courts were precluded from trying others than Belgians for offences against the French army. Further, the Agreement is not concerned so much with the 'personnel of the forces' as with persons who do not belong to either army. Finally the statement of the same author (at p. 549) that this Franco-Belgian Agreement 'served as a model for many others which followed it' is inaccurate. On the contrary, later Agreements formulated an entirely different principle—jurisdiction over all persons who committed offences against the visiting army was taken away from the foreign military authorities, except when such offences were committed by members of the foreign force. For a discussion of these later agreements see below, pp. 389–90.

[3] Op. cit., p. 51.

Agreement of 15 December 1915[1] formulated a different principle by which the local courts had exclusive jurisdiction over all persons, other than members of the visiting army, who committed offences against that army. It was this Agreement, and not the Franco-Belgian Agreement of 14 August 1914, which served as a model for later Agreements between France and her other Allies. The relevant clause, which provided the second exception to the wide jurisdiction recognized in the opening sentence of the Franco-Belgian Agreement of 14 August 1914, reads:

> 'Les deux gouvernements sont aussi d'accord pour reconnaître, pendant la présente guerre, la compétence exclusive en territoire français de la justice française à l'égard des personnes étrangères à l'armée britannique qui commettraient des actes préjudiciables à cette armée et la compétence exclusive en territoire britannique de la justice britannique à l'égard des personnes étrangères à l'armée française qui commettraient des actes préjudiciables à ladite armée.'[2]

Similar Agreements were concluded between the French Government and the Governments of Belgium,[3] Serbia,[4] Italy,[5] Portugal,[6] the United States of America,[7] and Siam.[8] The jurisdiction of the courts martial of each Allied army, *ratione personae*, had been narrowed down until it comprehended only the members of that army. The exercise of this residuary jurisdiction was confirmed in all the Agreements by a general recognition of 'la compétence exclusive des tribunaux (des) armées d'opérations respectives à l'égard des personnes appartenant à ces armées, quels que soient le territoire où elles se trouvent et la nationalité des inculpés'. There is no room for doubt that the exclusive jurisdiction over members of the Allied armies in France effectively barred the exercise of supervisory jurisdiction by the local French courts.

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[1] *London Gazette*, 31 December 1915, p. 13025; *J.O.*, 16 December 1915, p. 9199; *Clunet*, 43 (1916), p. 356. On 30 August 1919 the duration of this Agreement was extended to such time as it should be revoked, see *J.O.*, 30 August 1919, p. 9306; *Clunet*, 46 (1919), p. 1226.

[2] Ibid., paragraph 2.

[3] Agreement of 29 January 1916. See *J.O.*, 29 January 1916, p. 809; *Clunet*, 43 (1916), p. 726, at p. 727; on 30 August 1919 the duration of this Agreement was extended until such time as it should be revoked. See *J.O.*, 30 August 1919, p. 9145; *Clunet*, 46 (1919), p. 1226.

[4] Agreement of 14 December 1916. See *J.O.*, 14 December 1916, p. 10767; *Clunet*, 44 (1917), p. 1169; on 30 August 1919 this Agreement (as an Agreement with the Kingdom of Jugoslavia) was extended until revoked. See *J.O.*, 30 August 1919, p. 9306; *Clunet*, 46 (1919), p. 1234.

[5] Agreement of 18 August to 1 September 1917. See *J.O.*, 1 September 1917, p. 6915; *Clunet*, 44 (1917), p. 1871. By Agreement of 24 November to 2 December 1919 this Agreement was extended for as long as Italy should remain in a state of war. See *J.O.*, 25 January 1920, p. 1298; *Clunet*, 47 (1920), p. 364.

[6] Agreement of 15 October 1917. See *J.O.*, 15 October 1917, p. 8141; *Clunet*, 45 (1918), p. 418; on 30 August 1919 this Agreement was extended for as long as Portuguese troops should remain in France. See *J.O.*, 30 August 1919, p. 9306; *Clunet*, 47 (1920), p. 837.

[7] Agreement of 3 and 14 January 1918. See *J.O.*, 16 February 1918, p. 1611; *Clunet*, 45 (1918), pp. 867–71; *Foreign Relations of the United States*, 1918, Supplement 2, p. 737. By Exchange of Notes dated 10–29 August 1919 this Agreement was extended until the expiration of 30 days after denunciation thereof by either Government. See ibid., pp. 755–6; *J.O.*, 5 September 1919, p. 9546; *Clunet*, 46 (1919), p. 1231.

The Franco-American Agreement was based on the Anglo-French Agreement of 15 December 1915, which was printed, evidently as an English translation from the French text, on p. 735 of the *Foreign Relations of the United States*, 1918, Supplement 2. This translation contains a serious error. It describes the exclusive jurisdiction in French territory of the French courts over '*foreign*' persons in the British army who may commit acts prejudicial to that army. If this were so, it would be in flat contradiction to the first sentence of the very same Agreement which recognized the exclusive jurisdiction of the British courts martial over 'persons belonging to the British army *whatever nationality* the offender may be'. It was not a question of exclusive French jurisdiction over 'foreign persons in the British army' but over persons *not belonging to* (personnes étrangères à) the British army. This mistranslation was adopted by Taschereau J. in *Reference* re *Exemption of United States Forces from Canadian Criminal Law*, [1943] S.C.R. 483 at p. 517.

[8] Agreement of 24 May 1918. See *J.O.*, 28 May 1918, p. 4649; *Clunet*, 45 (1918), p. 1457. It was not until the first week in August 1918 that the advance contingents of Siamese troops arrived in France. See *Clunet*, 45 (1918), p. 1586.

(*b*) *Great Britain*

Until the arrival of reinforcements from the United States of America in 1917 there were comparatively few foreign troops in Great Britain. The position of visiting forces in Great Britain was radically different from that in France. In Great Britain it was impossible to regard them as invested with the powers of a friendly army in quasi-occupation of territory, as had been done in France. In France the local Government had been concerned to prune the exercise of the powers which it was believed the Allied armies possessed; in Great Britain the main problem was to make possible the exercise of the very fundamental jurisdictional powers of the visiting forces. Considerable numbers of Empire forces, mainly from the Dominions, received part of their training in England and Scotland, but, as they were subject to the United Kingdom Naval Discipline Act or Army Act, as the case may be, no conflict of jurisdictions arose. Such French and Belgian forces as there may have been in Great Britain were thought, at least by their own authorities, to be covered by the reciprocal provisions in the Anglo-French and Anglo-Belgian Agreements of 15 December 1915[1] and 15 April 1916.[2]

However, from the only instance which we have been able to discover concerning the applicability of either of these Agreements in Great Britain no conclusive deduction can be drawn. The case concerned two Belgian soldiers, Aughet and de Dryver, the former of whom had been sent to London on a Special Mission by the Belgian Government. In a quarrel Aughet shot and severely wounded de Dryver. Aughet was arrested by the British police and handed over to the Belgian Military Authorities who took his depositions, preparatory to bringing a charge against him before a Belgian court martial at Calais. Before Aughet was removed to France de Dryver commenced a private prosecution against him for attempted murder. This charge was heard in the Bow Street Police Court on 21 September 1917.[3] Counsel for Aughet informed the Court that the Belgian military authorities had proposed to bring accused before the Belgian court martial at Calais and asked that the case be adjourned for six weeks. In spite of objections from Counsel for de Dryver the Magistrate made the order asked for. De Dryver, however, who was persuaded that the charge against Aughet would have little chance of success if brought before a Belgian Military Court, Aughet being his superior, applied to the High Court for a rule *nisi* in the nature of a *mandamus* calling upon the Bow Street Magistrate to show cause why he should not hear and determine the information lodged against Aughet. The application came before Hill J., the Vacation Judge, who expressed no opinion on the merits of the case, but granted the rule to be returnable before the first Divisional Court in the next sittings.[1] As an integral part of his order, Hill J. ruled that no steps should be taken to remove either Aughet or de Dryver out of England in the meantime and that his ruling should be communicated to all the military authorities concerned.[2] The Belgian military authorities, who alone were affected by the Order, complained that the Anglo-Belgian Agreement of 15 April 1916,[3] by giving the military tribunals of the Belgian army of operations exclusive jurisdiction over members of that army, precluded the learned Vacation Judge from making an Order as to the disposition of Aughet and de Dryver. Such an Order was in effect an exercise of supervisory jurisdiction over the Belgian military tribunals, seeing that it made impossible any assumption of jurisdiction over the case by them until the order had expired. The British Government replied, however, that in its view the Anglo-Belgian Agreement was inapplicable, since neither Aughet nor de Dryver was a member of the Belgian Army of Operations properly so-called. The Agreement, it maintained, applied only to the forces of either Government which were actually fighting or in the war zone. The Belgian military authorities placed a different interpretation on the Agreement, contending that it applied to all members of the Belgian army no matter where they were.[4] It was not necessary to pursue the matter further because the Divisional Court before which the rule was returned dismissed the application[5] and the Belgian authorities proceeded with the charge against Aughet before their court martial at Calais.[6]

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[1] See above, p. 389, n. 1.

[2] *London Gazette*, 14 April 1916, p. 3917.

[3] *de Dryver* v. *Aughet*, *The Times* newspaper, 22 September 1917, p. 3 *c*.

With the arrival of considerable numbers of troops from the United States of America in the second half of 1917 the relationships between the local authorities and the visiting forces called for clear definition. The negotiations between the Governments of Great Britain and the United States of America show that the main problem concerned the exercise of supervisory jurisdiction by the local courts. The whole purpose of the negotiations was, in the words of the first Note of 5 September 1917 from the British Government to the Ambassador of the United States of America, to overcome 'the difficulties that may be found by the United States military authorities in the maintenance of discipline among United States officers and soldiers when serving in this country, *owing to the existing English law relating to arrest for and the trial and punishment of offences committed in this country*'.[1] The difficulties to which the Government referred were especially acute in connexion with the arrest of deserters from and of soldiers in the forces of the United States of America who had committed offences not against the law of that part of the United Kingdom where they were stationed but solely against their own military law.[2] English law[3] has provided certain occasions when a person may be lawfully arrested, but desertion from a foreign force or the commission of acts contrary to a foreign military code do not rank among them. An arrest and detention of a person for any of these reasons would therefore be unlawful and dealt with accordingly. The goal aimed at in the negotiations between the two Governments was to arrange for steps to be taken

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[1] *R.* v. *Garrett, ex parte de Dryver, The Times* newspaper, 27 September 1917, p. 3*d*.

[2] Ibid.

[3] *London Gazette*, 14 April 1916, p. 3917.

[4] Ibid. The Belgian authorities relied especially on the words 'à l'égard des personnes appartenant à ces armées *quels que soient le territoire où elles se trouvent . . .*'.

[5] *R.* v. *Garrett, ex parte de Dryver*, [1918] 1 K.B. 6, 87 L.J.K.B. 129, 117 L.T. 660, 82 J.P. 74, 34 T.L.R. 13, 26 Cox C.C. 78, 62 *Sol. Jo.* 104.

[6] It is probable that the failure of the British Government to translate the Anglo-Belgian Agreement into the municipal law of the United Kingdom by means of Statute or regulation deprived it of all effectiveness.

> 'to *legalise* the assistance of the military and civil authorities in this country in handing over to their own military authorities United States officers and soldiers who may be found outside the limit of the quarters occupied by United States troops in this country and who may appear to have committed an offence against their national military discipline or law with a view to their being dealt with by the United States military authorities'.[4]

The contrast between the powers of the military authorities of the United States of America inside the quarters occupied by their armed forces and their powers outside those quarters implied here and expressed earlier in this opening Note of the Negotiations is a further example of the misguided fealty paid to the fiction of extraterritoriality. The argument seems to be as follows: The area occupied by the visiting armed forces of a friendly Power is extraterritorial. The writs of habeas corpus, &c., do not, therefore, run in the area of the foreign camp. It is believed that there is little to commend this argument based, as it is, on a now much discredited fiction. As, however, it had no substantial effect on the course which the negotiations took it is not proposed to comment on it.

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[1] *Foreign Relations of the United States*, 1918, Supplement 2, p. 733. Italics added.

[2] Ibid. In the Note of the British Government to the Ambassador of the United States of America in London it was stated that: 'outside the limits of their quarters, however, (the United States troops) are liable to be dealt with by the English criminal courts for any offences against the English criminal law, but could not be apprehended for any purely military offence (such as desertion, absence without leave, &c.) either by their own or the English military police or by the civil police'.

[3] Except where the context requires a contrary meaning the phrase 'English law' is used throughout this article to mean the law of any part of the United Kingdom.

[4] *Foreign Relations of the United States*, 1918, Supplement 2, pp. 733–4. Italics added.

The first suggested solution put forward by the British Government was that a regulation under the Defence of the Realm Act be made

> 'giving power to the British military authorities in general terms to make and revoke or vary orders from time to time for subjecting United States and other Allied troops in this country to their own systems of military discipline and for arresting and handing them over to their own military authorities, either in this country or abroad, in case of any alleged military or criminal offence, whether such offence was contrary to English law or not'.[1]

The wording of this Note, which could perhaps have been more happily phrased, raises a problem which troubled many commentators on the Allied Forces Act, 1940, and which will be considered later.[2] At this point it is enough to mention that the intention of the phrase 'orders . . . for subjecting United States and other allied troops in this country to their own systems of military discipline' was not to assert the claim that the authorities of visiting forces in Great Britain depended on a British Order-in-Council for their disciplinary jurisdiction. The Note was referring solely to English municipal law which only could be affected by Order-in-Council. Without such an Order English municipal law regarded United States and other Allied troops as subject to no military discipline; for this anarchy the British Government suggested that the proposed Order would be an adequate remedy.

Since after three months no reply had been received from the Government of the United States of America to the first Note, the British Government communicated with the Ambassador on 12 December 1917[3] and again on 18 January 1918[3] stating that the legal difficulties of the authorities in the army of the United States of America were becoming more acute with the arrival of additional troops. In these Notes it was suggested that regulations should be made 'making it an offence for a person summoned as a witness before an American court-martial to fail to attend or to refuse to be sworn, answer questions, or produce documents, or to give wilfully false evidence or to commit a contempt of Court'.[4] All these recommendations, the Note of 18 January 1918 emphasized, were made 'solely for the purpose of granting additional powers to the United States military authorities *in order to enable them to maintain discipline* among their own officers and men'.[3]

Having obtained the concurrence of the Government of the United States of America to these proposals by Note of 5 February 1918,[5] the British

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[1] *Foreign Relations of the United States*, 1918, Supplement 2, p. 734.

[2] See below, p. 404.

[3] *Foreign Relations of the United States*, 1918, Supplement 2, p. 737.

[4] Ibid., p. 738.

[5] Ibid., pp. 739–40.

Government submitted to it a draft Regulation and Order of the Army Council for its information and comment.[1] Both were acceptable to the Government of the United States of America and on 22 March 1918 the Regulation was made law as No. 45F of the Defence of the Realm Regulations.[2]

Two sections can be singled out for special reference as showing how the allied forces in Great Britain were withdrawn from the supervisory jurisdiction of the local courts. The key provision is to be found in Section 1 which reads:

> '(1) It is hereby declared that, subject to any general or special agreement, the naval and military authorities and courts of an ally may exercise in relation to the members of any naval or military force of that ally who may for the time being be in the United Kingdom all such powers as are conferred on them by the law of that ally.'

The section carefully refrains from appearing to grant to the authorities and service courts of the visiting force any jurisdiction or power to exercise that jurisdiction over the members of that force. The existence of such jurisdiction and the power to exercise it are assumed, as is shown by the words 'all such powers as are conferred on them by the law of that ally': they are, indeed, implicit in all the sections of the Regulation, except those which deal with offences committed against a visiting force by persons who are not members of that force. Section 1 makes wide general provisions which require to be supplemented in certain particulars. The most important of these, for present purposes, is contained in Section 9 which provides:

> 'Any sentence passed in the United Kingdom on a member of a naval or military force of an Ally by a naval or military Court of an Ally in accordance with the laws of the Ally may be executed according to the tenour thereof within the United Kingdom and if the sentence involves the detention of any person in custody that person whilst in custody in pursuance of the sentence shall be deemed to be in legal custody, and any sentence passed on such a man by such a court shall be deemed to be in accordance with the law and to be within the jurisdiction of the Court and the Court shall be deemed to have been properly constituted.'

Again the principal concern of the section is to make the exercise of jurisdictional power by the military authorities of a visiting force lawful according to English law. The section effectively excludes the possibility of the exercise of supervisory jurisdiction by the local court except in a small number of cases which because of their relatively slight importance it is not proposed to consider here.

Regulation 45F had a comparatively short life,[3] but it was taken as a model for legislation on the subject of jurisdiction over visiting forces from the British Commonwealth fifteen years later and in the Second World War.

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[1] *Foreign Relations of the United States*, 1918, Supplement 2, pp. 741–4.

[2] Order of 22 March 1918, *S.R. & O.*, 1918 (No. 367), i, pp. 332–3, s. 6.

[3] It expired on 31 August 1920. See s. 2 of the War Emergency Laws (Continuance) Act, 1920 (10 & 11 Geo. V, c. 5).

Negotiations with the Government of the United States of America continued after the making of that Regulation. The British Government proposed an Agreement similar to the Anglo-French Agreement of 15 December 1915 and in principle the Government of the United States of America concurred. Drafts between the two Governments had been exchanged,[1] but since by this time hostilities had ceased and there were few if any forces of the United States of America in Great Britain the British Government declined to proceed further with the matter. There is no reason to suppose that had the war continued longer an Agreement would not have been reached on the lines proposed.[2]

It remains to consider how far the Anglo-French and Anglo-Belgian Agreements of 15 December 1915 and 15 April 1916 respectively were valid and enforceable in Great Britain. There seems to be no doubt that any court in Great Britain would have refused to give any effect to them.[3] To have done so would have been a violation of the well-known principles which in Great Britain curb the treaty-making powers of the Executive. These Agreements interfered with the rights of non-enemy aliens in the Realm. These were persons for whom the King's writs should have been available and the King's courts open to prevent or redress any threatened or actual deprivation of their liberty according to English law. The Agreements could not be enforced unless they were first translated into law by legislation or by regulation made pursuant to an empowering Act of Parliament. No such translation into municipal law was attempted. In so far as the Agreements purported to entitle the authorities of the French and Belgian forces in Great Britain to exercise jurisdiction over their forces, Regulation 45F gave effect to them, although it was unconnected with the Agreements in purpose and content, as is shown by the continuation of negotiations with the Government of the United States of America to conclude a similar Agreement after the making of that Regulation. It should be noted that the Government of the United States of America, in a letter to its Ambassador in London,[4] was of opinion that it was doubtful what treatment the similar Franco-American Agreement of 14 January 1918 would receive in the courts of the United States of America.

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[1] *Foreign Relations of the United States*, 1918, Supplement 2, pp. 753–4.

[2] Ibid., pp. 759–60. Cf. *Malero Manuel* c. *Ministère Public*, *Annual Digest*, 1943–5, Case No. 42 at p. 160, for a contrary suggestion which lacks support in the negotiations between the two Governments.

[3] Cf. British Note to Ambassador of the United States of America in London dated 15 March 1918: '. . . these Regulations (45F) are a more comprehensive and satisfactory method of procedure than an agreement such as has been concluded between His Majesty's Government and the (French) Government, which, while acting satisfactorily in France, left the question of jurisdiction in this country open to some doubt.' *Foreign Relations of the United States*, 1918, Supplement 2, p. 741.

[4] *Foreign Relations of the United States*, 1918, Supplement 2, p. 740.

III. *The British Commonwealth visiting forces legislation*

Perhaps the most significant development on the subject of jurisdiction over visiting forces during the years between the two World Wars arose from the emergence of the British Dominions into 'autonomous communities within the British Empire equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations'.[1] Before this stage in the development of the Dominions had been reached, the jurisdictional position of troops from one part of the Empire when visiting another part was clear. The United Kingdom Naval Discipline Act, the Army Act, and latterly the Air Force Act were law throughout the Commonwealth, and all armed forces from wherever they came in the Empire were regarded simply as His Britannic Majesty's Forces. Thus Australian forces, say, visiting South Africa, as they did during the Boer War, 1899–1901, were in the same position *vis-à-vis* the courts of Cape Colony and Natal as they would have been in Australia or any part of the Empire. But when once the Dominions became independent and autonomous in law, difficulties would arise because, on the one hand, the Dominions would be constitutionally capable of enacting legislation repugnant to that of the Parliament at Westminster,[2] and, on the other, the Dominions would not necessarily be bound by legislation of that Parliament.[3] Thus, assuming that Canada passed a new Army Act, and that a deserter from a visiting United Kingdom Force was arrested in Canada and handed back to his authorities, his arrest or detention could not be justified according to the United Kingdom Army Act because it would not apply in Canada, nor according to the Canadian Army Act because it would not apply to United Kingdom Forces. In view of the coordination in defence matters which it was hoped would continue in the Commonwealth it was therefore necessary to provide for the visits of the troops of one Dominion to another. A Committee set up after the Imperial Conference of 1926 to inquire into necessary legislation on this subject, reported:

> 'In connection with the exercise of extra-territorial legislative powers, we consider that provision should be made for the customary extra-territorial immunities with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter.'[4]

This recommendation was carefully considered and submitted to the Imperial Conference of 1930 where it was adopted.[5]

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[1] Imperial Conference, 1926, *Summary of Proceedings*, p. 14 (Cmd. 2768).

[2] Statute of Westminster, 1931 (22 Geo. V, c. 4), s. 2 (2).

[3] Ibid., s. 4.

[4] *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation*, 1929, p. 17, section 44 (Cmd. 3479).

[5] Imperial Conference, 1930, *Summary of Proceedings*, p. 26 (Cmd. 3717): 'It is assumed that

These recommendations reveal that the problem which required solution was the relationship of a visiting force to the supervisory jurisdiction of the local courts. This is indicated by the concern expressed that there should be no period of time when the legal basis of military discipline might be impeached on any ground. It is further indicated in the Commonwealth legislation which was later enacted in accordance with the recommendations of the 1930 Imperial Conference. In general this legislation followed the same form throughout the Commonwealth: it will be convenient, therefore, to confine our examination to the United Kingdom Act, which had been drafted as a model[1] for Dominion legislation, and to refer to the Statutes of Dominions only for the purpose of pointing out divergencies from it.

The United Kingdom Statute was entitled the Visiting Forces (British Commonwealth) Act, 1933.[2] Subsection 1 of the first section in the Act gives a kind of *exequatur* to the service courts and service authorities of a visiting force. It provides:

> '(1) When a visiting force is present in the United Kingdom, it shall be lawful for the naval, military, and air force courts and authorities (in this Act referred to as the "service courts" and "service authorities") of that part of the Commonwealth to which the force belongs to exercise within the United Kingdom in relation to members of the force in matters concerning discipline and in matters concerning the internal administration of the force all such powers as are conferred upon them by the law of that part of the Commonwealth.'

The subsection makes no attempt to confer jurisdiction on the service courts and authorities of the visiting force; the concluding words show that such jurisdiction is assumed to exist. The whole emphasis is on making lawful the exercise within the United Kingdom of that jurisdiction.

Subsection 3 of that same section deals with the immunity of the service courts and authorities from the supervisory jurisdiction of the local courts. It provides:

> '(3) Where any sentence has, whether within or without the United Kingdom, been passed upon a member of a visiting force by a service Court of that part of the Commonwealth to which the force belongs, then for the purposes of any legal proceedings within the United Kingdom the court shall be deemed to have been properly constituted, and its proceedings shall be deemed to have been regularly conducted, and the sentence shall be deemed to be within the jurisdiction of the Court and in accordance with the law of that part of the Commonwealth, and if executed according to the tenor thereof shall

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all Governments will desire to take such action as may be necessary to secure (1) that the military discipline of any of the armed forces of the Commonwealth when present, by consent, within territory of another, rests upon a statutory basis, and (2) that there shall be no period of time during which the legal basis of military discipline could on any ground be impeached.

'The methods by which the above two objects can best be obtained must necessarily be a matter for the Governments themselves.'

[1] Earl Stanhope introducing the Visiting Forces (British Commonwealth) Bill in the House of Lords, *Official Report*, 25 October 1932, vol. 85, col. 808.

[2] 23 Geo. V, c. 6.

be deemed to have been lawfully executed, and any member of a visiting force who is detained in custody in pursuance of any such sentence, or pending the determination by such a service court as aforesaid of a charge brought against him, shall for the purposes of any such proceedings as aforesaid be deemed to be in legal custody.'

In the debates on the Bill in both the Lords,[1] where it was introduced, and the Commons[2] this subsection produced a lively controversy. Members of both Houses were quick to notice that the subsection would deprive a visiting soldier of all legal protection in case of arbitrary punishment. Both sources from which aid might possibly come were blocked: the courts of that part of the Commonwealth to which the visiting force belonged would be powerless, because of the strictly territorial nature of the supervisory writs, and now, it was argued, the subsection would bar the doors of the local courts against the soldier. If this was the case with Dominion forces visiting the United Kingdom, the opponents of the Bill argued, it would also be the case with United Kingdom forces visiting Dominions which had passed or would pass similar legislation. Herein lay the main reason for the opposition to the subsection which alone prevented the whole-hearted acceptance of the Bill on all sides.[3]

The rest of the Act is for the most part devoted to incidental matters the purpose of which is to implement the disciplinary powers of the service authorities of the visiting force. The effect of these provisions is to place the visiting force in almost the same position *vis-à-vis* English non-military law as the British Forces are in.[1] But throughout the Act the immunity from the local supervisory jurisdiction, which is given concrete expression in Subsection 3 of Section 1, is emphasized.[2]

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[1] *Official Report*, 13 December 1932, vol. 86, cols. 347–57; ibid., 20 December 1932, vol. 86, cols. 473–88.

[2] Ibid., 15 November 1932, vol. 270, cols. 1081–92; ibid., 13 February 1933, vol. 274, cols. 734–52; ibid., 7 March 1933, vol. 275, cols. 1109–24.

[3] In the House of Lords this objection was answered by the Secretary of State for War, Viscount Hailsham, who said: '. . . It is important to realize their position (i.e. of visiting forces from a foreign country) because all this much-attacked subsection does is to put the Dominion forces in the same position, as far as discipline is concerned, as every foreign Force is in when it visits our shores. With regard to a Foreign Force the recognised principle of International Law is that if one country invites or permits the force of another to come within its territory, then that force brings with it the principle of extraterritoriality and no Court of the country visited can interfere in any way with its discipline. . . . If, therefore, we invite or permit, say, a French force to come here to take part in some tournament, or we invite an American force to come here and assist in our defence when we are fighting any European War, those French soldiers and those American soldiers have no right to apply to a British Court' (*Official Report*, 20 December 1932, vol. 86, cols. 481–2).

A similar but less carefully worded reply was given on behalf of the Government in the Commons by the Solicitor-General (*Official Report*, 7 March 1933, vol. 275, cols. 1120–1). But both in the Lords and Commons there were a considerable number of members who disputed this view and, to quote from the speech of Sir Stafford Cripps, a former Law Officer of the Crown, urged that it was 'wholly wrong to suggest that our Courts could hold at the present moment (i.e. without legislation) that it was part of our Common Law that the writ of *habeas corpus* does not run in the case of a foreign soldier visiting this country' (*Official Report*, 9 March 1933, vol. 275, col. 1485. See also a letter of Lord Atkin, a Lord of Appeal in Ordinary, in *The Times* newspaper, 8 February 1933, p. 13*e*). The opponents of the subsection pressed for a division. It was evident that the only reason why a majority voted in favour of the subsection standing part of the Bill was that they were convinced that there was a moral obligation to pass the Bill in view of the recommendations of the 1930 Imperial Conference and the undertakings previously given by the Government to the other members of the British Commonwealth.

Similar legislation had already been enacted in the Union of South Africa,[3] and was later passed in Canada,[4] Australia,[5] New Zealand,[6] Newfoundland,[7] and in the territories administered by the United Kingdom Government.[8] Without exception these enactments adopted the fundamental provisions of Subsections 1 and 3 of Section 1 in the United Kingdom Statute. In two cases, however, the broad immunity from the local supervisory jurisdiction which that Statute secured was modified in the Dominion Acts.

(*a*) It is common in all armed forces that individual officers should have power to exercise summary jurisdiction over persons under their command. Any exercise of such jurisdiction by an individual officer in command of a visiting force is just as much liable—in the absence of local legislation—to be set aside by the courts in the exercise of their supervisory jurisdiction. In principle, therefore, such legislation as was passed in the British Commonwealth ought to provide for the immunity from the local supervisory jurisdiction of the exercise of disciplinary powers not only by the service courts of the visiting force but also by the individual officers in that force. With one probable exception this was effected in the legislation of all the Dominions. It was done by an expanded definition of the term 'Court' whose activities form such an important part of the fundamental provisions of all these Acts. The term '"Court" includes . . . any officer of a visiting force who is empowered by the law of that part of the Commonwealth to which the force belongs to review the proceedings of a service court, or to investigate charges, *or himself to dispose of charges*. . . .'[9] The italicized phrase appears in the definition sections of all the Dominion Statutes[10] except the Defence Act (Amendment) and Dominion Forces Act, 1932, passed by the Parliament of the Union of South Africa.

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[1] Ss. 1 (2), 2, 3 (1) and (2), and 4.

[2] Cf. especially s. 1 (4): 'No proceedings in respect of the pay, terms of service or discharge of a member of a visiting force shall be entertained by any Court of the United Kingdom'; and proviso to s. 2 (1): 'Provided that nothing in this subsection shall authorise any interference with the visiting force in matters relating to discipline, or to the internal administration of the force.'

[3] Defence Act (Amendment) and Dominion Forces Act, 1932 (Act No. 32 of 1932).

[4] The Visiting Forces (British Commonwealth) Act, 1933 (23 & 24 Geo. V, c. 21).

[5] Defence (Visiting Forces) Act, 1939 (No. 5 of 1939).

[6] Visiting Forces Act, 1939 (3 Geo. VI, c. 36).

[7] The Visiting Forces (British Commonwealth) Act, 1940 (4 Geo. VI, c. 29).

[8] Visiting Forces (British Commonwealth) (Application to the Colonies, &c.) Order in Council, 1940, *S.R. & O.*, 1940 (No. 1373), i, p. 1092. This Order in Council was made under the authority of ss. 5 and 6 of the Visiting Forces (British Commonwealth) Act, 1933 (U.K.) (23 Geo. V, c. 6).

[9] Visiting Forces (British Commonwealth) Act, 1933 (U.K.), s. 8 (1).

[10] Canada—s. 2 (1) (*c*); Australia—s. 5; New Zealand—s. 2; United Kingdom Colonies Order —s. 2 (2); Newfoundland—s. 2.

The probable effect of this omission, for which no reason was given in the Senate or the House of Assembly during the passage of the Bill, is to preserve the exercise of local supervisory jurisdiction over any attempted summary disposition by an individual officer of a charge against a soldier. On the other hand, it could be argued that the phrase 'empowered . . . to investigate charges', which does appear in the South African Act, includes, apart from its normal meaning of investigation preparatory to bringing a charge before a service court, a judicial investigation and determination of a charge once brought. But such an interpretation is at variance with the normal meaning of the term 'investigation of a charge' which, as all the other Commonwealth Statutes recognize, is distinct from the 'disposition of a charge'.

(*b*) A far-reaching modification appears in Section 12 of the Defence (Visiting Forces) Act, 1939 (Aus.), and its counterpart, Section 9 of the Visiting Forces Act, 1939 (N.Z.). The latter[1] provides:

> 'Nothing in this Act shall be construed to authorise any service court of any part of the Commonwealth to impose on a member of a visiting force in respect of any offence any penalty exceeding the penalty to which a member of the home forces would under the law of New Zealand be liable for a similar offence.'

The clear effect of these sections is to make contrary to the law of Australia or New Zealand, as the case may be, any exercise of jurisdiction by the service courts or authorities of a visiting force which provides for the imposition of a penalty exceeding the penalty to which an offender of the local forces would be liable in like circumstances. In such a case the supervisory jurisdiction of the local courts, anaesthetized by the pivotal sections corresponding to Section 1 (1) and Section 1 (3) of the United Kingdom Act, would be revived. Thus, if the maximum sentence to which a member of the Australian forces would be liable for desertion in certain circumstances is six months' imprisonment, a member of a visiting force who had been sentenced to nine months' imprisonment for desertion in similar circumstances, would, it is believed, be successful in obtaining a writ of habeas corpus from the local courts securing his release at the expiration of six months. None of the other Dominion Statutes contained similar provisions nor did the regulations[2] made in Australia and New Zealand concerning the exercise of jurisdiction over forces from outside the British Commonwealth which were visiting those countries during the Second World War.[3]

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[1] Quotation from the Australian Act is avoided because of the confusion which may arise over the two meanings of the word 'Commonwealth'.

[2] National Security (Allied Forces) Regulations, S.R. 1941, No. 302 (Australia), and the United States Forces Emergency Regulations, 1943, S.R. 1943/56 (N.Z.).

[3] During the debate on the Allied Forces Bill, 1940, in the House of Commons it was urged that the power of the service courts of the visiting allied forces to impose sentences of death

IV. *The Second World War*

(*a*) *United Kingdom*

The position of Allied forces who were in the United Kingdom during the Second World War was vastly different from that of the Allied forces who fought in France and Belgium in the First World War. Then the battlefield was in France and Belgium; with the exception of fighting in the air it was never in the United Kingdom. Further, the Allied forces who came to England in 1940 arrived not as fully equipped and perfectly organized units ready at once to move into and take control of a zone of operations in which they would continue the fighting, but rather as the broken and disorganized remnants of armies and air forces which had been seriously defeated. This situation called for radically different treatment.

The Allied forces were reorganized and employed under the British High Command, at times as separate units, on other occasions, mainly in the air forces, as part of British units. All the Allied forces, however, retained their national character and for the most part were maintained as homogeneous units under the immediate disposition of their own military authorities. In nearly all cases—at least where there were a substantial number of Allied forces in United Kingdom territory—it was thought advisable to enter into Agreements between the United Kingdom Government and the exiled Government concerned. All these Agreements followed a common pattern which was first given form in Appendix III to the Anglo-Czechoslovakian Agreement of 25 October 1940.[1] Of this Appendix III Articles 1 and 2 were of primary importance. The former provided:

> 'Subject to the provisions of Article 2 below, jurisdiction in matters of discipline and internal administration over members of the Czechoslovak Land Forces in the United Kingdom shall be exercised in accordance with Czechoslovak military law, and offences against discipline shall be tried and punished accordingly by the Czechoslovak Military Courts and authorities.'

Article 2 reads:

> 'The offences of murder, manslaughter, and rape shall be tried only by the civil courts of the United Kingdom. Acts or omissions constituting offences against the law of the United Kingdom other than murder, manslaughter and rape shall be liable to be tried by the civil courts in the United Kingdom.'

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should be curbed. An amendment was proposed as follows: 'Provided that nothing in this Act shall confer on such courts the power to pass sentence of death, except for offences for which a sentence of death could be passed upon a British subject.' But later, probably owing to the lack of Government support, the amendment was, by leave, withdrawn. See *Official Record*, 21 August 1940, vol. 364, cols. 1403–14

For a discussion in the House of Commons on the imposition by the service courts of the United States forces of penalties which were more severe than those which would have been imposed in similar conditions by United Kingdom courts martial, see *Official Record*, 25 May 1944, vol. 400, cols. 908–9.

[1] See Schwelb in *Czechoslovak Yearbook of International Law* (1942), pp. 155–6. See also Táborský, *The Czechoslovak Cause* (1944), pp. 122–4.

Some of the other articles of Appendix III were machinery provisions relating to the procedure to be adopted by the Czechoslovak authorities when an offence under Article 2 had been committed,[1] and when a member of the Czechoslovak forces was being tried by a civil court in the United Kingdom.[2] Articles 5 to 7 inclusive provided that Czechoslovak Air Force personnel were to be subject to Air Force law and United Kingdom civil law in the same way as members of the Royal Air Force were, with the exception that any Air Force court trying a Czechoslovak airman for any offence was to include an officer of the Czechoslovak Air Force.

The clear implication of Article 1 of the Appendix is that, since jurisdiction in matters of discipline and internal administration over members of the Czechoslovak Land Forces in the United Kingdom was to be exercised *in accordance with Czechoslovak military law*, then, subject to the modification contained in Article 2, there was to be no interference by the United Kingdom courts in the exercise of this military jurisdiction.

This immunity from the supervisory jurisdiction of the United Kingdom courts qualified, as it was, in respect of the exercise by the Czechoslovak military courts of jurisdiction, under the rubric of matters of discipline, over Czechoslovak soldiers who had committed murder, manslaughter, or rape, lacked effectiveness in the absence of municipal legislation. The legislation which was passed to create the conditions which would enable this Agreement and the Agreements with the other Allied Governments[3] to be carried into effect was the Allied Forces Act, 1940.[4] The plan of the Act was simple. First of all there was provision for the exercise of jurisdiction in the United Kingdom by the Allied service courts—not only the service courts of those Governments with which Agreements had been entered into—indeed the Act makes no mention of the Agreements, being prior to them—but the service courts of any Government which may be 'allied with His Majesty'. In Subsection 1 of Section 1 it is provided that:

> 'Where any naval, military, or air forces of any foreign Power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, the naval, military and air force courts and authorities of that Power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that power.'

Subsection 2 of the same section makes provision for the Free French Forces, which were then in an anomalous position. Subsection 3 makes applicable by Order in Council to the visiting allied forces certain of the provisions of the Visiting Forces (British Commonwealth) Act, 1933. Among these latter provisions is Subsection 3 of Section 1 of that Act, which, we have seen, confers a defined immunity from the supervisory jurisdiction of the United Kingdom courts.

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[1] Art. 3.

[2] Art. 4.

[3] Anglo-Polish Protocol of 22 November 1940—see Kuratowski in *Transactions of the Grotius Society*, 28 (1942), p. 1; Agreement with the Free French Forces of 15 January 1941; Anglo-Norwegian Agreement of 28 May 1941; Anglo-Netherlands Agreement of 5 May 1942; and Anglo-Belgian Agreement of 4 June 1942.

[4] 3 & 4 Geo. VI, c. 51.

The only other provision of the Allied Forces Act, 1940, which concerns us at this point is contained in Section 2 (3) which reads:

> 'A court (i.e. an Allied service court) shall not have jurisdiction by virtue of the foregoing section to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any such civil Court (i.e. in the United Kingdom) as aforesaid.'

This subsection gives the second qualification to the immunity of the Allied service courts from the United Kingdom supervisory jurisdiction. To take an example: a member of the Belgian forces who has served his term of imprisonment for theft imposed by a United Kingdom civil court is tried by a Belgian service court for the same offence, is convicted and sentenced to a term of imprisonment. Application for the issue of a writ of habeas corpus is made on his behalf. The return to the writ specifies the relevant provisions of Belgian military law, Section 1 (1) of the Allied Forces Act, 1940, and Section 1 (3) of the Schedule to the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940. Such a return, it is believed, would be insufficient to justify the detention of the accused. Section 1 (1) of the Act authorizes the exercise of jurisdiction by the service courts of an Allied force *subject to* the provisions of the Act. The exercise of jurisdiction in this case is contrary to Section 2 (3). It is therefore invalid at English law.

There is apparently no case on record in which an Allied service court exercised jurisdiction contrary to the provisions of Section 2 (3) of the Act. However, in relation to the Court of Honour of the Polish Air Force a specific qualification was made to Section 2 (3)[1] and the trial by that Court of an officer in the Polish Air Force who had already been tried by the United Kingdom courts was authorized.

It is not intended here to enter upon a detailed examination of the Allied Forces Act, 1940, and the numerous Orders in Council and other subordinate legislation made under its authority. Certain aspects of this legislation have been discussed by various authors.[2] Yet there are three aspects of the Act which it is necessary to consider for a proper appreciation of its function.

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[1] Allied Forces (Polish Air Force) Order, 1941, s. 5, *S.R. & O.*, 1941 (No. 438), vol. i, p. 23. See *Allied Forces (Polish Court of Honour) Case*, *Annual Digest*, 1941–2, Case No. 32, p. 128.

[2] See especially Kuratowski, loc. cit., and Schwelb, loc. cit., and in *A.J.*, 38 (1944), pp. 50 ff., and ibid., 39 (1945), pp. 330–2.

(i) It has been objected[1] that the Allied Forces Act, 1940, purports to grant jurisdiction to the visiting service courts and authorities. It is said that no state can accept a grant of jurisdiction from another, and that for this reason the wording of the Allied Forces Act, 1940, is infelicitous. In an announcement of 15 January 1942 the office of the Judge-Advocate of the United States of America stated,[2] with obvious reference to the United Kingdom Statute:

> 'A Statute of a foreign country purporting to confer jurisdiction on United States courts-martial of matters concerning discipline and internal administration . . . is objectionable. United States courts-martial derive their authority solely from the Constitution and from the laws of the United States: it cannot be increased or diminished by legislation of a foreign power.'

In particular, criticism has been levelled at the following clauses: 'The . . . courts and authorities of that Power may, subject to the provisions of this Act, exercise . . .', Section 1 (1); 'by a court exercising[3] jurisdiction by virtue of the foregoing section . . .', Section 2 (2); and 'A court shall not have jurisdiction by virtue of the foregoing section . . .', Section 2 (3).

While the principle upon which these objections are founded is well established, it is also no less well settled, as Schwelb has pointed out,[4] that no state need allow any exercise of jurisdiction on its territory by the courts and authorities of another state. It follows that it is permissible for a state making such a concession to determine for itself how far it will allow this jurisdiction to be exercised. This is the function of the Allied Forces Act, 1940. Both the Act and the Jurisdictional Agreements concluded between the United Kingdom Government and certain of the exiled Allied Governments recognized that the jurisdiction of the Allied service courts and authorities already existed. It was not the existence of jurisdiction that was in question, but the manner and extent of its exercise. No exception can therefore, it is believed, be taken to the aim of the Act or its wording, unless it be Section 2 (3) where the word 'have' might with advantage be replaced by the word 'exercise'.[5]

(ii) Two of the qualifications on the exercise of jurisdiction by Allied service courts in the United Kingdom have already been noticed.[1] The first, prohibiting the trial of an Allied serviceman for the offences of murder, manslaughter, and rape, finds no place in the Allied Forces Act, 1940, nor in any other provision of English law. Consequently, there would appear to be no legal procedure for resisting the exercise of jurisdiction by an Allied service court over these crimes.[2] The second restriction above discussed is contained in Section 2 (3) of the Allied Forces Act, 1940.

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[1] See King in *A.J.*, 36 (1942), p. 557.

[2] *Bulletin of the Office of U.S. Judge Advocate General*, 1 (1942), p. 13.

[3] It is difficult to accept the interpretation of King in *A.J.*, 36 (1942), p. 557, who states that 'Subsection 2 (2) . . . speaks of the courts-martial of the visiting forces *having* jursidiction "by virtue of the foregoing section".' (Italics added.)

[4] *A.J.*, 38 (1944), p. 58; see also Drucker in *Czechoslovak Yearbook of International Law* (1942), p. 53.

[5] Similarly, the wording of s. 1 (5) of the Schedule to the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940, following s. 1 (5) of the Visiting Forces (British Commonwealth) Act, 1933, is unfortunate in this respect. It speaks of 'enabling the service courts . . . to exercise more effectively the *powers conferred upon them by the Allied Forces Act, 1940* . . . .' Although in the final analysis this wording is not inconsistent with the view stated in the text, it is believed that the section could preferably be phrased thus: 'enabling the service courts . . . to exercise their functions more effectively . . . .'

A fundamental qualification, which illustrates the interplay between English law and the law of the Allied Force, relates to the concept of membership[3] in an Allied force. It is impossible here to discuss more than the main provisions relating to that term. The Allied Forces Act, 1940, authorizes the exercise of jurisdiction by an Allied service court in the United Kingdom only 'in relation to members' of that force. The question is, which system of law decides whether a person is a member of an allied force? The answer is that both do. In the first place, as Viscount Caldecote L.C.J. pointed out in *Re Amand*,[4] it is only the law of the Allied state that can make a person a member of its armed forces. However, since to leave entirely to the law of an Allied state the determination of the question whether a person is a member of the armed forces of that state might be to surrender jurisdiction over persons in whose liberties the local state might be vitally interested, English law laid down certain desiderata of its own which must be complied with before a person may in English law be regarded as a member of an Allied force. These requirements are contained in the Allied Forces (Application of 23 Geo. V, c. 6) (No. 1) Order, 1940,[5] in the Allied Powers (War Service) Act, 1942,[6] and for the armed forces of the United States of America in the Visiting Forces (United States of America) Act, 1942.[7]

(iii) We have seen that the effect of the Act is to exclude the supervisory jurisdiction of the United Kingdom courts except in certain matters which in practice are of small importance. In so doing it enables 'the foreign general to use that discipline and inflict those punishments which the government of his army may require'. To that extent it is submitted that the Act is declaratory of international law. The Attorney-General informed the House of Commons during the debate on the Bill that 'we are not so much conferring a benefit as fulfilling an obligation under the international law'.[1]

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[1] See above, pp. 402, 403.

[2] In *R.* v. *Navratil*, *Annual Digest*, 1919–42, Supplementary volume, Case No. 85, p. 161, Cassels J. inferred that the Czechoslovak military courts might have had jurisdiction over the accused who was charged with manslaughter.

[3] On this question see Schwelb in *Czechoslovak Yearbook of International Law* (1942), pp. 157 ff., and in *A.J.*, 38 (1944), pp. 65–9. And see *In re Amand* (No. 1), [1941] 2 K.B. 239, *Annual Digest*, 1941–2, Case No. 28, p. 111; *In re Amand* (No. 2), [1942] 1 K.B. 445, more fully reported in [1942] 1 All E.R. 236; *Re de Bruijn*, [1942] 1 D.L.R. 249, *Annual Digest*, 1941–2, Case No. 29, p. 116; *Re Romeijnsen*, [1942] 1 D.L.R. 262, *Annual Digest*, 1941–2, p. 119; *Zylberszlag* v. *G.O.C. Polish Forces in Palestine* (1942), 9 P.L.R. 526; *Katz* v. *O.C. the Polish Military Prison, Jerusalem* (1944), 11 P.L.R. 355, *Annual Digest*, 1943–5, Case No. 45, p. 165; and *In re Scellier*, *Journal of Criminal Law*, 9 (1945), p. 169.

[4] [1941] 2 K.B. 239 at p. 255.

[5] *S.R. & O.*, 1940 (No. 1818), s. 2 (1)—definition of 'member'.

[6] 5 & 6 Geo. VI, c. 29, s. 5 (1).

[7] 5 & 6 Geo. VI, c. 31, s. 2.

(*b*) *The British Commonwealth and Empire*

Each of the Dominions of the Commonwealth, except Eire, was visited at one time or another by part of the armed forces of states with which it was allied. The earliest visiting forces to arrive were from other members of the British Commonwealth. Naturally, the exercise of jurisdiction by the service courts and authorities of these visiting Commonwealth forces was regulated by the application of the legislation which has been discussed above.[2] With regard to armed forces from countries outside the Commonwealth the Dominions followed, in general, the model of the United Kingdom Allied Forces Act, 1940. Such differences as there may be are of small importance and consisted mainly of modifications to suit local conditions. From the plethora of subsidiary legislation passed by the Dominions to deal with the whole problem of implementing the jurisdiction of the service courts of visiting forces from foreign[3] countries it is only possible to mention the main Regulations. These were the Foreign Forces Order, 1941 (Canada);[4] National Security (Allied Forces) Regulations (Australia);[5] War Measure No. 108 of 1942 (Union of South Africa); and the United States Forces Emergency Regulations, 1943 (New Zealand).[6] India passed the Allied Forces Ordinance, 1942,[7] and the position of Allied forces in colonies under the administration of the United Kingdom Government was dealt with by the Allied Forces (Application of Acts to Colonies, &c.) (No. 1) Order, 1941.[8]

(*c*) *The United States of America*

There were not at any time during the Second World War any very considerable numbers of the armed forces of allies of the United States of

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[1] *Official Report*, 21 August 1940, vol. 364, col. 1405. See also Schwelb in *Czechoslovak Yearbook of International Law* (1942), p. 147, and Táborský, op. cit., at pp. 122–4.

[2] See above, pp. 396–400.

[3] I.e. outside the British Commonwealth.

[4] P.C. 2546 of 15 April 1941. S. 3 of this Order prohibited the exercise of jurisdiction by the service courts of visiting forces over members of those forces in relation to the crimes of murder, manslaughter, and rape. See above, pp. 401–5.

[5] S.R. 1941, No. 302 of 17 December 1941. These regulations followed closely the Allied Forces Act, 1940 (U.K.).

[6] S.R. 1943/56 of 7 April 1943. As this title indicates, these Regulations deal with the exercise of jurisdiction of the service courts of the United States of America, the only Allied country whose armed forces visited New Zealand in substantial numbers during the war.

[7] No. LVI of 1942, 26 October 1942. There had been no previous legislation in India concerning visiting forces. The Allied Forces Ordinance, 1942, is modelled on both the Allied Forces Act, 1940 (U.K.), and the Visiting Forces (British Commonwealth) Act, 1933 (U.K.).

[8] *S.R. & O.*, 1941 (No. 155), i, p. 32, 15 January 1941.

America in that country. There were enough, however, to give rise to problems relating to the exercise of jurisdiction over them. Certain Departments of the Government of the United States of America, following literally the dictum of Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon*,[1] took the view that the mere presence of foreign forces in the territory of the United States of America with the consent of that country brought into immediate operation an emphatic rule of international law that such foreign forces were immune from *all* the jurisdiction of the United States of America. According to such a view there was no need for the Congress of the United States of America to enact legislation providing for the immunity of such visiting forces from the supervisory jurisdiction of the local courts.[2] Having regard to the provisions of the Constitution of the United States of America relating to personal liberty and due process of law it is doubtful whether the courts of the United States of America would be impressed with such a view. However, no case has been found in which a member of a visiting force applied to the local courts for the exercise of their supervisory jurisdiction, although it is known that such persons were detained in the United States of America both by their own authorities and by the local military authorities.[3]

There were, however, certain powers, incidental to the exercise of jurisdiction by the service courts of a visiting force, which required to be secured by legislation.[4] For this purpose the Congress of the United States of America passed an 'Act to implement the jurisdiction of service courts of friendly foreign forces within the United States, and for other purposes'.[5] That the service courts of the visiting forces already possessed jurisdiction over members of those forces in the United States of America is implicit in the long title of the Act, and in its phraseology. Further, the proceedings in Congress during the passage of the Bill show that not only was the existence of this jurisdiction recognized, but also the right to exercise it in the United States of America was accepted. Indeed, when Senator Revercomb introduced in the Senate an amendment[6] to the Bill making explicit reference to this latter right, his proposal was defeated for two reasons. First, because, if such a right existed under international law, it was unnecessary to make specific provision for it; and secondly, because it was thought, to quote from a speech of Senator Ferguson,[7] that:

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[1] See above, p. 383.

[2] Cf. King in *A.J.*, 40 (1946), pp. 276–7, and Bathurst in this *Year Book*, 23 (1946), p. 338.

[3] *Bulletin of the Office of U.S. Judge-Advocate-General*, 2 (1943), pp. 7, 130, relating to the detention of Canadian and Free French forces respectively.

[4] Cf. Statement of Under-Secretary of State for Foreign Affairs in the House of Commons, *Official Report*, 30 November 1943, vol. 395, cols. 237–8.

[5] Public Law 384, 78th Congress (Chap. 326, 2nd Session), 58 Stat. 643, 22 U.S. Code 701–6.

[6] *Congressional Record–Senate*, 22 June 1944, p. 6577, col. 1: 'The service court of any friendly foreign force, as herein defined, is hereby authorized to exercise its jurisdiction within the territorial limits of the United States . . . .'

[7] Ibid., p. 6578, col. 1.

> 'if we say that we hereby authorize a foreign service court to exercise its jurisdiction within the territorial limits of the United States, . . . it can well be said that Congress is creating that court a court under the jurisdiction of and giving it authority from this particular body'.[1]

If there was any substance in this objection of Senator Ferguson, it was realized that far from exempting the service courts from the supervisory jurisdiction of the local courts the Bill would merely emphasize the subjection of the service courts to it.[2]

The analogous legislation in the United Kingdom was the Allied Forces Act, 1940,[3] and Public Law 384 of the 78th Congress, performed, broadly speaking, the same functions. The salient provisions of that Law have been noted by other writers,[4] and it is not proposed at this point to discuss them except to examine certain limitations which that Law places on the exercise of the jurisdiction of the service courts of visiting forces:

(i) The law propounds a novel test for its own coming into operation. If the view taken by the Attorney-General, Sir Donald Somervell, in the House of Commons is correct, as it is believed it is, then the mere consent to the presence of visiting forces imposes an obligation to pass legislation, such as the Allied Forces Act, 1940, implementing the jurisdiction of the service courts of those forces.[5] Section 6 of Public Law 384, however, provides:

> 'This Act shall be operative with respect to the military, naval, or air forces of any foreign State only after a finding and declaration by the President that the powers and privileges provided herein are necessary for the maintenance of discipline. The President may at any time revoke such finding and declaration.'[6]

In commending the Bill to the favourable consideration of the Senate the Committee on the Judiciary reported:[7]

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[1] This view, it is believed, has little to commend it. It cannot be supposed that a court, when authorized by a legislature to exercise jurisdiction which it already possesses apart from that legislature, is by that mere authorization a creature of the legislature. All that can be said is that the legislature lays down the limits of the exercise of this jurisdiction, as, of course, it is entitled to do when granting the right. This is precisely what Congress did in the Bill.

[2] Cf. Senator Ferguson in *Congressional Record–Senate*, 22 June 1944, p. 6578, col. 1.

[3] Letter from Attorney-General Biddle to the Chairman, Committee on the Judiciary, U.S. Senate, 13 April 1944. Mr. Biddle wrote: 'Reciprocal legislation has been enacted by the British Parliament which has recognised the jurisdiction of courts-martial of military and naval forces of the U.S. to operate in the United Kingdom and to try offences charged (*sic*—read "alleged") to have been committed by members of such forces (3 & 4 Geo. VI, c. 51).' Actually, the 'reciprocal legislation' was the United States of America (Visiting Forces) Order, 1942, *S.R. & O.* 1942 (No. 966) made under the authority of s. 1 (3) of the Allied Forces Act, 1940.

[4] King in *A.J.*, 40 (1946), p. 276, and Bathurst in this *Year Book*, 23 (1946), p. 341.

[5] See above, p. 406, n. 1. This is certainly the basis of the dictum of Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon* (1812), 7 Cranch 116.

[6] Such declaration was made in respect of forces from the United Kingdom and Canada by Presidential Proclamation No. 2626 of 11 October 1944 (9 Federal Register 12403). It is noteworthy that the third preamble to the Proclamation introduces the element of reciprocity—'whereas the United Kingdom and Canada have recognised the right of the United States to jurisdiction over offences committed by members of its armed forces' (sc. in the United Kingdom or Canada, as the case may be).

[7] Report to Senate of Committee on the Judiciary to accompany H.R. 3241 (78th Congress, 2nd Session)—Calendar No. 972, Report No. 956.

> 'This proposed legislation is of a . . . conditional nature since its operation is revocable at the pleasure of the President as Agent of the Congress under Section 6. This is an important feature of the Bill. At any rate Congress is at liberty to repeal or amend at any time.'[1]

In practice there is no doubt that the President would not revoke the operation of the law without the concurrence of the Government whose visiting forces were concerned; but it is submitted that even in theory the operation of the Act should have been dependent solely on the presence of friendly foreign forces in the territory of the United States of America by its consent. As it is there may well be a considerable period of time between the arrival of a visiting force and the making of a Presidential Proclamation.[2]

(ii) When this Bill was referred to the Committee on the Judiciary, Section 2, which dealt with the arrest of offenders, provided that the arrest of an offender from a friendly foreign force and the handing over of him to an officer of such force should be lawful. The Committee amended the section to provide that it should only be lawful to hand over such an offender 'for trial in such service court *within the United States* for such offenses as shall lie within the jurisdiction of the service courts of such friendly foreign forces'.[3] The purpose of this amendment, the Committee explained, was to 'narrow the scope of the Bill and require that the trial take place within the United States'.[4] It was the view of the Committee 'that a law-breaking foreigner who (had) become subject to civil arrest for violation of our laws should not be removed to his homeland, or out of our national jurisdiction before trial'.[5] Whatever the merits of such a view may be with regard to such offences the section refers to offences generally, and therefore includes offences against the military law of the visiting forces but not against the local law. The delivery of a deserter from a unit to his authorities immediately before the departure of the unit from the United States of America would according to Section 2 not be lawful. In any event the authorities of the unit would not be able to give any assurance that trial would take place within the United States of America as was contemplated in the U.S. War Department Instructions.[6] By reason of this limitation the Act differs from Section 3 (3) of the Visiting Forces (British Commonwealth) Act, 1933, which contemplates the removal of the deserter out of the United Kingdom.

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[1] In this last the Bill cannot have differed from the vast majority of Bills passed by Congress.

[2] In fact such facilities as the Law provided for in s. 2 (arrest of offenders by U.S. forces) and s. 5 (imprisonment in places of detention in the U.S.) had evidently been necessary for the maintenance of discipline among Canadian forces at Fort Benning, Georgia, as far back as 1942. See *Bulletin of the Office of the U.S. Judge-Advocate-General*, 2 (1943), p. 7.

[3] Italics added. For the attitude of the British Government on this subject in the First World War see above, p. 393, n. 1.

[4] Report to Senate of Committee on the Judiciary, loc. cit.

[5] Ibid.

[6] Memorandum No. 650–45, War Department, 19 February 1945. See below, p. 411, n. 3.

In the Senate the section was again amended by the addition of a further restriction on the exercise of jurisdiction by the service courts of visiting forces. This amendment dealt with the venue of trial of members of a visiting force who had committed an offence against 'a member of the civilian population'. To find the source of inspiration for this amendment we must refer to the Exchange of Notes of 27 July 1942 between the Governments of the United Kingdom and the United States of America,[1] giving to the service courts and authorities of the United States forces in the United Kingdom the right to exercise '*exclusive* jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of these forces'.[2] To give effect to this Exchange of Notes in the United Kingdom the United States of America (Visiting Forces) Act, 1942,[3] was passed providing simply that no criminal proceedings should be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the forces of the United States of America.[4] Although the Exchange of Notes formed a Schedule to the Act, it is not referred to in any of the operative provisions of the statute nor can it modify any of these provisions.[5] In particular, there appears no provision in the Act corresponding to paragraph 5 of the Note from the United Kingdom Government which asked for confirmation of the understanding

> 'that the trial of any member of the United States Forces for an offence against a member of the civilian population would be in open court (except where security considerations forbade this) and would be arranged to take place promptly in the United Kingdom and within a reasonable distance from the spot where the offence was alleged to have been committed, so that witnesses should not be required to travel great distances to attend the hearing'.[6]

In the absence of any translation into municipal law, paragraph 5 can have no effect there. Paragraph 5 is, therefore, an agreement (i) between the Governments of the United Kingdom and the United States of America, (ii) relating to one of the understandings upon which a grant of the exercise of exclusive jurisdiction was made, and (iii) having no effect in the municipal law of the United Kingdom.

In the Senate the amendment to Section 2 was transcribed almost verbatim from paragraph 5 of the Note from the United Kingdom Government. It was thus transplanted into entirely different soil. In the first instance, the Senate amendment was not restricted to visiting forces from the United Kingdom only, but applied to friendly foreign forces in general.[1] Secondly, the Senate amendment was in no way related to a grant of permission to exercise exclusive jurisdiction in criminal matters. Thirdly, the amendment would be in the nature of a municipal law restriction on the exercise of jurisdiction by the service courts of a friendly foreign force over criminal offences. The effect of the amendment appears to be to make unlawful the arrest and delivery of an offender from a friendly foreign force when the trial will take place at a great distance from the place where the offence was committed. The Law gives no indication to the person making the arrest of such an offender how he is to satisfy himself of the legality of the arrest and delivery of the offender; but the Instructions issued by the United States War Department provided that

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[1] Schedule to United States of America (Visiting Forces) Act, 1942; *E.A.S.*, No. 355.

[2] Ibid., para. 1 of Note from United Kingdom Government. Italics added.

[3] 5 & 6 Geo VI, c. 31.

[4] S. 1 (1).

[5] It is difficult to see how the Schedule could have the force of law without derogating from the unrestricted exercise of jurisdictional power which had been secured to the forces of the United States of America by the United States of America (Visiting Forces) Order, 1942 (*supra*, p. 408, n. 3). For comment see a letter to *The Times* newspaper by a Lord of Appeal in Ordinary, Lord Atkin, 3 August 1942, p. 5*e*.

[6] See above, n. 1; para. 5 of Note from United Kingdom Government.

> 'delivery of the person arrested to the friendly foreign force shall not be made until that officer (i.e. requesting the delivery of the offender) shall have given assurance in writing—
>
> (*a*) That the person is a member of the friendly foreign force or subject to its military law;[2]
>
> (*b*) that the Service Courts of Canada or the United Kingdom have jurisdiction to try the offender;[2] and
>
> (*c*) that, if so required by Section 2 of the Act, his trial "shall be in open Court (except where security considerations forbid), shall take place promptly in the United States and within a reasonable distance from the place where the offense is alleged to have been committed, for the convenience of witnesses".'[3]

These restrictions on the exercise of jurisdiction by the service courts of a visiting force did not exist for the Allied service courts in the United Kingdom under the Allied Forces Act, 1940. Territorially the exercise of their jurisdiction was, as Schwelb has pointed out,[4] 'immense and unprecedented in International Law'.

V. *Conclusions*

The earliest formulation of the principle underlying the immunity of visiting forces from the supervisory jurisdiction of the local courts was made by Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon*.[5] In that case the jurisdictional immunity of troops in passage was joined with the similar immunity for sovereigns and diplomatic representatives to form a cogent argument for granting jurisdictional immunity to the public armed vessels of a friendly foreign state. It would appear from the reasoning of the

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[1] S. 1 (*a*) '"Friendly foreign force" means any . . . force of any friendly foreign State . . . .'

[2] This assurance was also required for the arrest and delivery of an offender who had not broken the local law, *supra*, p. 409, n. 6.

[3] Memorandum No. 650–45, War Department, 19 February 1945.

[4] *Czechoslovak Yearbook of International Law* (1942), p. 170.

[5] (1812), 7 Cranch 116.

Court that the basis of immunity in all cases was the same fundamental principle that the absolute jurisdiction of one state does not envisage the sovereign rights of another state as its object. However satisfactory this principle may be as a basis for sovereign and diplomatic immunity, there are strong reasons of theory and practice for seeking a more solid principle on which to base the jurisdictional immunity of visiting forces. It is, for instance, difficult to appreciate how the fact that a local court entertains an action for false imprisonment brought by a visiting soldier against his superior officer constitutes a violation of the sovereign right of a foreign state. The beginnings of the modern principle can be discerned in Marshall's judgment where he shows the incompatibility between the grant of a passage to foreign troops and the exercise of supervisory jurisdiction over them. The latest judicial expression of the principle underlying the immunity of visiting forces from the exercise of supervisory jurisdiction by the local courts was given by Rand J. in *Reference* re *Exemption of United States Forces from Canadian Criminal Law*[1] where he said:

> 'What has been invited into Canada is an army with its laws, courts, and discipline. It cannot be assumed that such an organisation would take the invitation to mean that, once the international border was crossed, its disciplinary powers should be suspended and its functions, except as to innocuous motions, come to an end.'

The modern principle is analogous to the notion of implied power so familiar to the student of federal constitutional law.

From the evidence examined in this article the following rule of international law may be formulated:

The consent of a state to the presence in its territory of the armed forces of a friendly foreign State implies an obligation to allow the service courts and authorities of that visiting force to exercise such jurisdiction in matters of discipline and internal administration over members of that force as are derived from their own law.[2] The permission to exercise this jurisdiction effectively implies an obligation to secure the immunity of the visiting forces from the supervisory jurisdiction of the local courts.[3]

The right of service courts and authorities of a foreign state to exercise their jurisdiction in the territory of the local state comprises a significant exception to the sovereignty of the latter state over its territory. It is to be expected, therefore, that the local state will itself be concerned to set the limits within which the visiting service courts and authorities may exercise their jurisdiction. There appears to be no principle of international law preventing that so long as there remains no substantial area within which the local courts may by the exercise of their supervisory jurisdiction paralyse the maintenance of discipline and the government of the visiting army.

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[1] [1943] S.C.R. 483 at p. 524.

[2] The exercise of jurisdiction by the service courts and authorities of the armed forces of a state outside the territorial limits of the state is not contrary to any rule of international law. See *Mohammad Mohy-ud-Din* v. *The King Emperor* (1946), 8 F.C.R. 94 *per* Spens C.J. at p. 105: 'Whatever may be the rule of international law as regards the ordinary citizen, we have not been referred to any rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits.'

[3] Cf. Jordan C.J. in *Wright* v. *Cantrell*, *Annual Digest*, 1943–5, Case No. 37 at p. 141: 'It is obvious that discipline could not be maintained if, when a member of the (foreign) force had been confined to barracks, a local Court would entertain an action by him against his superior officer for false imprisonment.'

The system of mutual defence which has been built up among Western European and North Atlantic countries under the aegis of the Atlantic Pact and other regional defence plans makes it probable that military co-operation among friendly Powers will continue for a considerable period. The problems relating to the exercise of jurisdiction over visiting forces, formerly confined to the occasion of joint war operations, now assume importance in time of peace. The measures taken in the United Kingdom during the Second World War can easily be revived for adaptation to these peace-time conditions. However, what is required for all countries concerned is general legislation, in the nature of the United Kingdom Visiting Forces (British Commonwealth) Act, 1933, applicable to all friendly foreign forces and defining clearly the precise powers which the service courts and authorities of the visiting force may lawfully exercise. Such legislation could then be brought into operation with or without modifications by executive decree as regards any particular visiting force.

NOTES

THE WAR CRIMES TRIALS AND THE LAWS OF WAR[1]

1. *Universality of jurisdiction.* THE period during and after the Second World War has witnessed a considerable advance in the sphere of international criminal law, and especially in the sphere of war crimes and crimes against the peace. Moreover, crimes against humanity have been recognized as punishable offences under international criminal law.[2] While the decisions of the courts regarding crimes against humanity other than those which also constitute war crimes have spoken mainly in terms of crimes committed by Germans against Germans, the important aspect of this development from the point of view of international law is the fact that offences committed by persons against their fellow nationals have been punished by the courts of other nations.

Such doubts as may previously have existed as to whether persons other than military personnel may be tried for offences against international criminal law[3] have been removed by the series of trials which opened in 1945. Those found guilty have included not only soldiers, but also civilians. Soldiers convicted have included not only the rank and file, but also high-ranking officers and chiefs of staff.[4] It is clear that the mere fact of being a civilian affords no protection whatsoever against a charge based upon international criminal law. In an early trial before a British Military Court, the *Essen Lynching* case (*Heyer and Others*), civilians were among persons found guilty of being concerned in the killing of three British prisoners of war.[5]

Criminal responsibility for war crimes and crimes against humanity has not been limited to persons shown to have performed physical acts which constituted crimes, such as persons who actually fired the fatal shot. The generally established rules of municipal law systems relating to complicity in crimes have in this field proved a useful guide to the courts.[6]

In general, the recent development of international criminal law has been in the direction of extending not only to Allied[7] nationals but also to former enemy nationals the war-time protection of laws analogous to those to whose protection they would have been entitled in any civilized country in peace-time. The claim may be made with confidence that the recent developments in the sphere of international criminal law have involved a considerable extension of the legal protection of human rights.

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[1] Unless otherwise indicated, the views expressed in this article are those of the author and do not necessarily reflect the official opinion of the United Nations Secretariat.

[2] See *Law Reports of Trials of War Criminals* (hereinafter referred to as *Law Reports*), vol. xv, pp. 134–8, and vol. vi, pp. 45–8. According to the judgment delivered in the *Justice Trial* (*Altstötter and Others*) by a United States Military Tribunal, crimes committed by German nationals against other German nationals or any stateless person may be regarded as crimes against humanity (ibid., vol. vi, pp. 39–40). According to the judgment of a United States Military Tribunal in the *Einsatzgruppen Trial* (*Ohlendorf and Others*), the Allied Control Council Law No. 10, when dealing with crimes against humanity, is not restricted as to the nationality of the victim (ibid., vol. ix, p. 47).

[3] See the argument of the defence in the *Belsen Trial* (ibid., vol. ii, pp. 72, 105, 152).

[4] The extent of possible guilt of the various categories set out above is illustrated in ibid., vol. xv, pp. 59–78.

[5] See ibid., vol. i, pp. 88–92; cf. ibid., vol. ix, pp. 65–6.

[6] Illustrations of this legal development, taken from the legislation of various countries or from the judicial practice of their courts, are set out in ibid., vol. xv, pp. 49–57, where examples of crimes of omission punished by the courts are also described. Despite the mass character of many of the crimes committed by military and civil agents of the Axis, group responsibility has, it appears, been consistently rejected. In vol. xv of the *Law Reports* it is argued that 'membership of criminal organisations' and 'common design' do not constitute offences, but merely ways in which it is possible to commit recognized offences (see respectively vol. xv, pp. 3 (para. vii), 58 (para. viii), and 98–9; and see pp. 94–8).

[7] Throughout this Note 'Allied' signifies the quality of being a national of a country which was a war-time Ally of the country whose courts recognize the legal principle under discussion.

Further justification for this claim is contained in the wide variety of offences against international criminal law which are now recognized. It is instructive in this connexion to note how many different types of offences against inhabitants of occupied territories have been recognized as violations of the laws and customs of war. In proving the commission of a war crime, no direct connexion with operations of war need be shown; the term 'war crimes' has been interpreted to include within its scope many offences committed by an enemy against Allied nationals during war-time on enemy soil or in occupied territory which had no direct connexion with the hostilities. Thus, for instance, war crimes have been held to include offences committed against Allied civilians in concentration camps, in civilian hospitals, and in the streets of towns.[1] Although, on a narrow interpretation, the Hague Regulations do not protect civilians outside occupied territory—the heading of Section II is 'Military Authority over the Territory of the Hostile State'—that circumstance has not in fact prevented courts from extending the protection of the laws and usages of war not only to Allied civilians on enemy soil but also to their children born on enemy soil.[2] The trend of judicial opinion which bases the law relating to economic offences in occupied territories solely upon violation of the property rights of the individual[3] is also interesting in this connexion as a possible further indication of the increasing importance which, it is suggested, is being attached to the protection of the rights of the individual by international criminal law.

Alongside this expansion of international criminal law in the direction of the greater protection of human rights there is a parallel trend towards diminishing the importance of technical offences by which no human rights have been violated. Such technical offences include offences committed in breach of surrender terms; the giving of unexecuted orders for the commission of crimes; the abuse of Red Cross protection; and offences committed against dead bodies.[4] The rarity of cases involving such offences as these is significant. Yet analysis of these four types of offences reveals that even they are not wholly technical. The first is non-technical in that a breach of surrender terms may delay the achievement of settled peaceful conditions between states. The second may be regarded as an attempted crime or as an incitement to commit a crime.[5] The punishment of the third type of crime indirectly helps to preserve the protection of the Red Cross for those who need it. Neither is the fourth type of crime, which shocks the conscience of civilized man, a purely technical offence.[6]

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[1] See *Law Reports*, vol. xv, p. 48.

[2] See ibid., pp. 85–6.

[3] See below, p. 413.

[4] See *Law Reports*, vol. xv, pp. 131–4.

[5] See ibid., p. 89.

[6] On pp. 231–2 of the official record of the judgment delivered in the *Ministries Trial* (*von Weizsaecker and Others*) by a United States Military Tribunal, there is a reference to what may be another offence which while of a technical character indirectly tends to affect human rights. The passage reads as follows: 'However, under the Geneva Convention and Hague Regulations (Article 77, Geneva Convention, 1929, and Article 14, Hague Regulations, 1907), Germany was under the duty of truthfully reporting to the Protecting Power, the facts surrounding the treatment of prisoners of war, and of the circumstances relating to the deaths of such prisoners. To make a false report was a breach of its international agreement, and a breach of International Law. The detaining powers' duty to report the facts was intended to prevent the very kind of savagery upon helpless prisoners which took place in the Sagan incident.

'If a belligerent can starve, mistreat or murder its prisoners of war in secret, or if it can, with

Furthermore, as will be seen elsewhere,[1] there is some doubt as to the criminality of the supersession of the existing courts of law in occupied territory by the occupant, viewed in isolation from the legality of the conduct of the new courts. If the criminality, independent of its results, of such a supersession were definitely established, this might be considered an example of a technical offence. But the fact that its criminality has not been definitely established may possibly be further evidence of the trend of international criminal law towards the protection of human rights as distinguished from the recognition of purely technical offences.

There have been further indications of the trend towards a greater protection of individual rights under international criminal law. Thus the doctrine of the universality of jurisdiction over war crimes is now generally accepted. Account has been taken of the crime itself rather than of (*a*) the nationality of the victim, provided that he has been, from the point of view of the court, an Allied national or could be treated as such; (*b*) the nationality of the accused, provided that he can be regarded as having identified himself with the enemy; or (*c*) the place of the offence. Thus there have been numerous trials in the courts of one Ally of offences committed against the nationals of another Ally or persons treated as Allied nationals. In many trials no victims of the nationality of the state conducting the trial were involved.[2] Cases have been tried by United States Military Commissions in which Germans were found guilty of war crimes committed in concentration camps against Allied nationals from European countries, such offences having been committed before the United States entered the war.[3] Secondly, while the nationality of the accused in war crime trials has usually been that of an enemy country, this has not invariably been the case.[4] Finally, some trials[5] have demonstrated that the place where a war crime was committed is of little importance.

2. *Superior orders.* With regard to the plea of superior orders the view which has been generally adopted by courts has been that the plea will be taken into consideration if the order relied upon was not known by the accused to be illegal under international law and if it was not obviously so illegal or of such a nature that he ought to have recognized its illegality; and that, while obedience to superior orders in such cases does not constitute an absolute defence, it may at the discretion of the court be treated as a factor which justifies mitigation of punishment. It seems that both these principles are now generally accepted, despite the existence of some pronouncements to the contrary.[6] A similar attitude has been adopted by the courts and the war crimes legislation of various countries with regard to the plea that the act alleged to constitute a crime under international criminal law was legal or even obligatory under municipal law.[7]

3. *Evidence and procedure.* The rules relating to evidence and procedure which were applied in war crimes trials, when viewed as a whole, represent an attempt to secure to the accused his right to a fair trial while ensuring that the guilty shall not escape punishment because of legal technicalities. There is a marked general similarity between the rules laid down in the Charters of the International Military Tribunals and the various municipal enactments with reference to the rights of the accused.[8]

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impunity, give false information to the Protecting Power, the restraining influence which Protecting Powers can exercise in the interests of helpless unfortunates would be wholly eliminated. Thus the duty to give honest and truthful reports in answer to inquiries such as were addressed by the Swiss Government is implicit.'

[1] See p. 414.

[2] See *Law Reports*, vol. xv, pp. 43–5. The protection of war crime courts has been extended to certain neutrals by the municipal legislation of some countries (see ibid., p. 85).

[3] Ibid., p. 44.

[4] See ibid., pp. 45–7.

[5] Ibid., p. 47.

[6] Ibid., pp. 157–60.

[7] Ibid., pp. 160–1.

[8] See ibid., pp. 189–97.

Similar rules of criminal procedure were taken into consideration by Allied courts when trying ex-enemy nationals on charges of denying a fair trial to Allied or to other ex-enemy nationals.[1]

While the accused is entitled to a fair trial, there is no rule of customary international law which provides that a court delivering judgment in a war crime trial must state the reasons for its decision. International practice on this point varies. The United States Military Tribunals in Nuremberg were bound by Article XV of Ordinance No. 7 of the Military Government of the United States Zone of Germany, which provided as follows: 'The Judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based. . . .' They have therefore delivered detailed reasoned judgments which show the evidential and legal grounds for their findings, as did those of the Nuremberg and Tokyo International Military Tribunals. Similarly, the Norwegian, French, and Dutch courts trying war criminals have, in varying degrees of fullness, given the reasons for the decisions arrived at. The Norwegian judgments have frequently entered into a detailed analysis and discussion of the relevant law and facts. On the other hand, the British, Canadian, and Australian Military Courts and the United States Military Commissions have not, in general, delivered reasoned judgments.[2] The discussions of these courts have been held in private sitting, and usually only the final decisions as to the guilt of the accused and the sentence have been announced. The arguments of Counsel before these courts are of interest in that they throw light on the considerations which the courts may have had in mind during their deliberations. They are not, however, an infallible guide. In strict law even the summing up of a Judge Advocate before a British, Canadian, or Australian Military Court, when such an officer has been appointed, is not a final indication of the law which the court applied.[3] In practice his words carry high authority.

The absence of a reasoned judgment particularly affects the value of the decision in cases of acquittal. When a court announces a finding of guilty it is possible, by examining the charge, to arrive at a general indication of what the court considered to be a crime. If a court acquits, and gives no reasons for its decision, no indication is given of the view which the court took as to the state of the law, since its findings may have been based not on the law but on the facts of the case.

4. *The penalties.* International law has previously been taken to lay down that a war criminal may be punished with death, whatever crime he may have committed. But Allied courts have regarded the fact that the punishment meted out by enemy accused to their victims was excessive in relation to the offence[4] as constituting in itself evidence of the denial of a fair trial. It seems also that Allied courts themselves have attempted to make the punishment proportionate to the crime. That practice has tended to modify the general rule that any war crime is punishable by death. On the other hand, certain offences other than homicide were punished with death; for instance, cases of torture and rape tried in Norwegian and Australian courts.[5] Death sentences were also pronounced by several Australian courts for cannibalism and mutilation of the dead. These sentences have usually been either commuted or overruled by the Confirming Authority. At the same time, a number of courts pronounced sentences of imprisonment upon accused convicted of unlawful killing.[6] Many of the accused who were found by the United States Military Tribunal in Nuremberg to have been respon-

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[1] See *Law Reports*, vol. xv, pp. 161–6.

[2] See ibid., p. 20.

[3] See ibid., p. 1, n. 3.

[4] See ibid., p. 164.

[5] See ibid., vol. iii, pp. 1–22, and vol. xv, p. 200.

[6] For some Australian cases where the charges were explicitly charges of murder see ibid., vol. xv, p. 200, n. 3.

sible for homicide actually executed by others were given sentences of imprisonment only.

5. *New methods of warfare.* The rules governing the conduct of actual military operations, aimed at protecting against unfair methods of warfare members of the armed forces and such civilians as may suffer during the conduct of hostilities, did not receive any considerable development in the trials here under examination. The rules of international law which relate to the actual conduct of hostilities were only infrequently made the basis of war crime proceedings. This fact was, perhaps, the result of a feeling on the part of the prosecuting authorities that the recent rapid development of methods of warfare had rendered questionable the validity of certain rules. In the *I.G. Farben Trial* a United States Military Tribunal said:

> 'It must be admitted that there exist many areas of grave uncertainty concerning the laws and customs of war. . . . Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare.'[1]

Certain passages of the judgment delivered in the *Trial of Friedrich Flick and Others* by a United States Military Tribunal are to the same effect.[2] A passage of the judgment of the Nuremberg International Military Tribunal with reference to the defendant Doenitz may also be recalled here. Having specifically found Doenitz guilty of a violation of the Naval Protocol of 1936, the Tribunal continued:

> 'In view of all the facts proved and in particular of an order of the British Admiralty announced on the 8th May 1940, according to which all vessels should be sunk at sight in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that that nation entered the war, the sentence on Doenitz is not assessed on the ground of his breaches of the international law of submarine warfare.'[3]

In the *Trial of Helmuth von Ruchteschell* by a British Military Court at Hamburg, from 5 to 21 May 1947,[4] the accused was found guilty, *inter alia*, on a charge of continuing to fire on a British merchant vessel after the latter had indicated surrender. The Prosecutor acting in that trial conceded that the question of the legality of attacks made by the accused on various merchant ships before their surrender did not arise in the proceedings taken against him. Similarly, in the *Peleus Trial*[5] the Prosecution preferred not to charge the accused with the illegal sinking of the steamship *Peleus*. The charge against them was that of:

> 'Committing a war crime in that you in the Atlantic Ocean on the night of 13th/14th March, 1944, when Captain and members of the crew of Unterseebot 852 which had sunk the steamship "Peleus" in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them.'

It was made clear at the outset by the Prosecution that the phrase 'in violation of the laws and usages of war' qualified the words that follow it, and not the words that precede it. In other words, the prisoners were accused of having violated the laws and usages of war not by sinking the merchantman, but by firing and throwing grenades at the survivors of the sunken ship.

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[1] See *Law Reports*, vol. x, pp. 48–9.

[2] See ibid., vol. ix, p. 23.

[3] Cmd. 6964 (1946), p. 109.

[4] See *Law Reports*, vol. ix, pp. 82–90.

[5] *Trial of Heinz Eck and Others*, by a British Military Court at Hamburg, 17–20 October 1945 (see ibid., vol. i, pp. 1–21).

No records of trials concerning the illegal conduct of air warfare were ever brought to the notice of the United Nations War Crimes Commission. Although in the Charter of the Nuremberg International Military Tribunal indiscriminate bombardment was apparently made a crime cognizable by the Tribunal, the Judgment did not contain any definite reference to the subject. The United States Military Tribunal acting in the *Einsatzgruppen Trial* (*Trial of Ohlendorf and Others*) made the incidental comment that 'a city is assured of not being bombed by the law-abiding belligerent if it is an open city'.[1] The 'deliberate bombardment of undefended places' is declared a war crime by Australian, Netherlands, and Chinese laws.[2] However, the lists of war crimes set out in these enactments were arrived at largely by the simple adoption of the list set out in the Report of the Commission on Responsibilities of the 1919 Peace Conference.[3]

6. *Conspiracy and crimes against the peace*. Little attention has been paid to the question of the extent of complicity necessary to bring about individual liability for crimes against peace. After the Second World War municipal law rules relating to complicity were of little service to the courts when they were called upon to determine that novel question. It may be felt that the words 'or waging' in the phrase 'planning, preparation, initiation or waging' of a war of aggression, contained in the definition of crimes against peace in the Charters of the Nuremberg and Tokyo International Military Tribunals and in Article II, 1 (*a*), of Law No. 10 of the Allied Control Council for Germany, are sufficient to throw a suspicion of guilt upon the most insignificant member of an army which is waging an aggressive war. Certainly paragraph 2 of Article II of Control Council Law No. 10, and especially clause (*f*) which relates only to crimes against peace, casts a very wide net:

> 'Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organisation or group connected with the commission of any such crime or (*f*) with reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in financial, industrial or economic life of any such country.'

However, the Nuremberg United States Military Tribunals which operated under Law No. 10 did not feel bound to find all persons who held high positions in Germany and so helped in waging aggressive war guilty of crimes against peace.

No rule of law excludes either business men or military personnel from liability for crimes against peace if the essentials of criminality are present.[4] However, clause (*f*) quoted above does not seem in fact to have proved of any considerable assistance to the Military Tribunals in their task of defining the legal extent of complicity in crimes against peace. The course most likely to lead to the establishment of a precise legal principle would be to restrict liability to those who were on a 'policy-making level' in relation to the planning and waging of specific wars of aggression. The Tribunal which conducted the *High Command Trial* (*Wilhelm von Leeb and Others*) held that no accused could be convicted of crimes against peace unless he was in a position to influence state policy.[1] The International Military Tribunal for the Far East followed the same line of thought.[2] The essence of this trend of opinion was set out in systematic form in the Dissenting Opinion of Judge Leon W. Powers in the *Ministries Trial* (*Ernest von Weizsaecker and Others*) by a United States Military Tribunal,[3] who, speaking of criminal liability for crimes against peace, said:

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[1] See *Law Reports*, vol. xv, pp. 110–11. The United Nations War Crimes Commission, in compiling lists of persons against whom a *prima facie* case of having committed a war crime had been established, consistently rejected cases alleging illegitimate bombardment if on the evidence before the Commission the bombarded places contained military objectives, and listed only such persons as were charged with having intentionally bombarded places containing no military objectives.

[2] See ibid., vol. v, p. 95; vol. xi, p. 94; and vol. xiv, p. 154.

[3] One indirect result of the paucity of trials in which allegations were made of the use during the Second World War of illegal methods of conducting hostilities appears to have been a dearth of judicial authority on the plea of legitimate reprisals used to justify acts between belligerents which would otherwise be illegal (as distinct from the use of the plea to justify measures taken by an occupying Power against the population of an occupied territory which would otherwise be illegal). Cf. ibid., vol. v, pp. 177 ff.

[4] See ibid., vol. xv, p. 144.

> 'As to each defendant, therefore, we must seek the answer to the following three questions:
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> (1) Did he knowingly engage in some activity in support of a plan or purpose to induce his government to initiate a war?
> (2) Did he know that the war to be initiated was to be a war of aggression?
> (3) Was his position and influence, or the consequences of his capacity such that his action could properly be said to have had some influence or effect in bringing about the initiation of the war on the part of his government?
>
> 'Only if all of these questions are answered in the affirmative will we be justified in finding a Crime against Peace has been committed.'[4]

The principle sought to be established by the authorities cited above was weakened by the judgments delivered in the *I.G. Farben Trial* and the *Krupp Trial* (*Alfred Krupp von Bohlen and Others*) by United States Military Tribunals. In the former it was stated:

> 'To depart from the concept that only major war criminals—that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation *and execution* of policies—may be held liable for waging wars of aggression would lead far afield.'

In the latter Judgment, speaking of the Briand–Kellogg Pact, the Court said:

> 'The language used in the Pact is to the effect that the signatories renounced war as a matter of national policy. Considered in the light of the complexity of the whole problem, the usage and custom which led to the Treaty and the object sought to be accomplished, it seems to me to be a reasonable view that the language used necessarily implies that only those responsible for a policy leading to initiation and waging of aggressive war *and those privy to such a policy together with those who, with a criminal intent, actively conduct the hostilities or collaborate therein*, are criminally liable in the event of war in violation of the Pact; for, if the threat of punishment deters these, there will be no war and the object of the law will have been accomplished.'[5]

It will be seen that the categories of possible offenders here include persons other than those responsible for state policy.

In the *High Command Trial* the Court held that, in certain circumstances, inaction could make an accused liable, as well as 'active participation':

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[1] See *Law Reports*, vol. xv, pp. 146–7.

[2] See official transcript of the Judgment, pp. 1185 and 1190–1, quoted in *Law Reports*, vol. xv, p. 147.

[3] It should be added that Judge Powers was of the opinion that only the *initiation* of aggressive war could be criminal under international law.

[4] P. 31 of the official transcript of Judge Powers's Judgment.

[5] See *Law Reports*, vol. xv, pp. 145–6 (italics inserted).

> 'If, however, after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed to do so.'[1]

The only trial among the twelve sets of proceedings held before United States Military Tribunals in Nuremberg in which convictions took place for crimes against peace was the *Ministries Trial*. An analysis of the findings of the majority of the Tribunal shows that that Tribunal was willing to adopt a wider notion of complicity in these crimes than did the Tribunal acting in the *High Command Trial* and even those which conducted the *I.G. Farben* and *Krupp Trials*. Applying the principles of municipal criminal law, the Court said:

> 'We hold that one, who is under duty to speak the truth, and who conceals the fact that a crime has been committed, or destroys or suppresses evidence regarding it, or who manufactures evidence tending to prove his government's innocence, is an accessory within the meaning of Section 2, Article II, of Control Council Law No. 10.'[2]

In the next paragraph, the majority Judgment adds:

> 'It must be apparent to everyone that the many diverse, elaborate and complex Nazi programs of aggression and exploitation were not self-executing, but their success was dependent, in a large measure, upon the devotion and skill of men holding positions of authority in the various departments of the Reich government charged with the administration or execution of such programs.'[3]

The Tribunal applied these principles in its examination of the part played by Weizsaecker, in his capacity of State Secretary in the German Foreign Office, in the diplomatic negotiations prior to the invasion and forcible incorporation of Bohemia and Moravia as a Protectorate into the 'Greater German Reich':

> 'He was not a mere by-stander, but acted affirmatively, and himself conducted the diplomatic negotiations both with the victim and the interested powers, doing this with full knowledge of the facts. Silent disapproval is not a defense to action. While we appreciate the fact that Weizsaecker did not originate this invasion, and that *his part was not a controlling one*, we find that it was real and necessary *implementation of the program.*
>
> 'We are therefore compelled to hold him guilty under Count One with respect to the invasion of Czechoslovakia.'[4]

In the judgments of other Courts there is even less precise guidance on the question of complicity in crimes against peace. In the trial of Takashi Sakai by a Chinese War Crimes Military Tribunal at Nanking, the accused was found guilty, *inter alia*, of a crime against peace in that he participated in a war of aggression.[5] Arthur Greiser was found guilty, *inter alia*, of crimes against peace, in his trial before the Supreme National Tribunal of Poland.[6] Neither the Chinese nor the Polish Court, however, examined the question of the degree of participation in the planning or waging of aggressive war required for a conviction. The Polish Court made it clear that Greiser had acted as an instrument of Hitler and had no part in the laying down of policy.[7]

7. *Conspiracy in war crimes and crimes against humanity*. The existence, as a separate offence, of conspiracy to commit the crime of preparing, initiating, or waging aggres-

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[1] See *Law Reports*, vol. xii, pp. 68–9.
[2] Official Record of the Judgment, p. 42.
[3] Ibid., p. 43.
[4] Ibid., p. 69 (italics inserted).
[5] See *Law Reports*, vol. xiv, pp. 4–7.
[6] See ibid., vol. xiii, pp. 104–5 and 108–9.
[7] See ibid., pp. 104–5.

sive war does not seem to have been doubted by the United States Military Tribunals.[1] In this they accepted the view of the Nuremberg International Military Tribunal.[2] On the other hand, again following the decision of the International Military Tribunal,[3] they did not recognize the notion of conspiracy to commit war crimes or crimes against humanity as a separate offence.[4] The same applies to the judgment of the Tokyo International Military Tribunal.[5] The Nuremberg International Military Tribunal and the United States Military Tribunals took the view that, under the Charter annexed to the London Agreement and under Law No. 10 and Ordinance No. 7, respectively, they had no jurisdiction to try alleged conspiracy to commit war crimes. It is possible to argue that the fact that the Court lacked jurisdiction in the matter does not necessarily indicate the non-existence of that type of crime. Courts acting under other legal instruments have assumed jurisdiction in this field. Thus provision was made in the applicable Netherlands laws for the punishment of conspiracy to commit a war crime.[6] Similarly, Article 265 of the French *Code Pénal* made provision for the punishment of associations and undertakings formed 'for the purpose of preparing or committing crimes against persons or against property' and has been acted upon in war crime trials held before French Military Tribunals.[7]

The discussion of the legal scope of the concept of crimes against humanity has turned on the meaning of 'persecutions on political, racial or religious grounds' to the virtual exclusion of the examination of the other offences enumerated in Article II, paragraph 1, of Control Council Law No. 10:[8] 'atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population.' The meaning of that part of the definition of crimes against humanity is not clear. There is evidence for the proposition that isolated offences cannot constitute crimes against humanity and that proof of systematic governmental organization of the acts in question is a necessary element of crimes against humanity.[9] Perhaps no offence could be considered as being 'committed against any civilian *population*' if it was an isolated offence or was not governmentally organized or approved.

In the second place, while it is clear that many types of acts could constitute either war crimes or crimes against humanity, not all types of acts which could constitute war crimes could also constitute crimes against humanity. It is not always easy to determine which war crimes are also crimes against humanity. In the *Flick Trial* it was laid down that offences against industrial property could not constitute crimes against humanity.[10] This ruling was adopted by the Tribunal acting in the *I.G. Farben Trial*.[11] A quotation from the Judgment delivered in the *Einsatzgruppen Trial*[12] indicates that the Tribunal acting in that trial regarded crimes against humanity as being offences such as 'murder, torture, enslavement' and infringements of 'freedom of opinion . . . the moral or physical integrity of the family . . . or the dignity of the human being'. The Judgment in the

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[1] See *Law Reports*, vol. xv, p. 148.

[2] See Cmd. 6964 (1946), pp. 42–4.

[3] *Law Reports*, vol. xv, p. 44.

[4] See ibid., vol. vi, pp. 5 and 104–10.

[5] It may be thought an unsatisfactory development that conspiracy to commit traditional war crimes should not be recognized as a separate offence while conspiracy to commit the crime of waging aggressive war—a crime of much shorter legal pedigree—should have received such recognition.

[6] See ibid., vol. xi, p. 98.

[7] See ibid., vol. xv, pp. 90–1.

[8] Similar phraseology appears in the Charters of the International Military Tribunals.

[9] See *Law Reports*, vol. vi, pp. 79–80, and vol. ix, p. 51.

[10] See ibid., vol. ix, pp. 48–51.

[11] See ibid., vol. x, pp. 41–2, 64.

[12] See ibid., vol. ix, pp. 49–50.

Flick Trial declared that 'a distinction could be made between industrial property and the dwellings, household furnishings, and food supplies of a persecuted people',[1] and thus left open the question whether such offences against personal property as would amount to an assault upon the health and life of a human being (such as burning his house or depriving him of his food-supply or his paid employment) could not constitute a crime against humanity. Certain passages from the Judgment of the Nuremberg International Military Tribunal which treated offences against property as crimes against humanity[2] may refer to acts of economic deprivation of this more personal type.

8. *The law relating to offences against private property*. Whenever the occupant takes away the private property of an inhabitant of the occupied country without his consent and the act is not one specifically permitted by international law, the seizure is clearly a war crime. What is the legal position if the property is taken away with the free consent of the owner with the result that the occupant's war effort is materially assisted?

In the judicial and other attempts which have been made at defining the precise limits of the war crime of pillage, plunder, or spoliation, stress has been placed on one or both of the following two possible aspects of the offence:

(i) that private property rights were infringed;
(ii) that the alleged offences injured the economy of the occupied territory and benefited that of the occupying state.

It would appear that, at least in the view of the Tribunals which conducted the *Flick Trial* and the *I.G. Farben Trial*,[3] the public effects of the act are not relevant provided that a sufficient infringement of private property rights has been proved to bring the offence within the terms of the Hague Regulations. There is also some authority for saying that, conversely, if no illegal breach of private property rights has occurred no war crime can be said to have been committed, irrespective of the effects of the act upon the general economy of the occupied territory or the enemy state. Thus the Tribunal in the *I.G. Farben Trial* was unable to 'deduce from Article 46 through 55 of the Hague Regulations any principle of the breadth of application' of the claim of the Prosecution in that case that

> 'the crime of spoliation is a "crime against the country concerned in that it disrupts the economy, alienates its industry from its inherent purpose, makes it subservient to the interest of the occupying power, and interferes with the natural connection between the spoliated industry and the local economy. As far as this aspect is concerned, the consent of the owner or owners, or their representatives, even if genuine, does not affect the criminal character of the act".'

The Tribunal insisted that the provisions of the Hague Convention regarding private property

> 'relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner. We look in vain for any provision in the Hague Regulations which would justify the broad assertion that private citizens of the nation of the military occupant may not enter into agreements respecting property in occupied territories when the consent of the owner is, in fact, freely given.'[4]

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[1] See *Law Reports*, vol. ix, p. 26.

[2] See ibid., pp. 50–1.

[3] See ibid., vol. x, pp. 160–2.

[4] See ibid., p. 46. Judge Leon W. Powers's Dissenting Opinion in the *Ministries Trial* includes the statement that the Hague Regulations, in so far as they concern property in occupied territory, 'contain no prohibition against purchases or sales of property located in the belligerent occupied territory. Indeed it is difficult to see how private property could be respected, if the right to sell it were denied' (pp. 107–8 of the *Official Record* of the Judgment).

In the *Krupp Trial*, on the other hand, rather more stress was placed on the second possible approach to war crimes committed against property rights. The Court stated that

> 'just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner'.[1]

9. *Work of prisoners of war*. The temptation which exists under modern conditions of war to use the labour of prisoners of war for purposes of war production, coupled with the fact that it is becoming increasingly difficult to differentiate between a nation's war effort and its normal productive activities, partly account for the doubts which exist regarding the extent or scope of the war crime of causing prisoners of war to perform work having a 'direct connection with the operations of war'. The Tribunal which conducted the *High Command Trial* held that 'in view of the uncertainty of the international law' on the question of the 'use of prisoners of war in the construction of fortifications', 'orders providing for such use from superior authorities, not involving the use of prisoners of war in dangerous areas, were not criminal on their face . . . '.[2]

The Judgment delivered in the *Ministries Trial* includes the following passage:[3]

> 'The counsel for prosecution contends that the use of prisoners-of-war for espionage and other like purposes against their own nation, even if voluntary, is a violation of International Law and of the Hague Convention respecting the Rules and Customs of War. (Article 6 of Chapter II, and Article 31 of Chapter VI of the Geneva Convention.) . . . We hold that the cited prohibitions of the Hague Convention prohibit the use of prisoners of war in connection with war operations, and apply only when such use is brought about by force, threats, or duress, and not when the person renders the services voluntarily.'

10. *Interference with the normal activities of the courts*. It is debatable whether a representative of an occupying Power commits a crime under international criminal law in effecting the supersession of the existing courts of law in occupied territory by a new system of courts. The Tribunal acting in the *High Command Trial* apparently felt that this did not constitute a distinct crime. It held that the population was not entitled even to a system of courts martial provided that it was justly treated. On the other hand, the Judgment delivered in the *Justice Trial* included a statement which could be interpreted as indicating that excessive interference with an existing legal system could be a war crime.[4]

11. *Responsibility of commanding officers*. No clear rule has emerged as to the extent to which a military or civil superior can be convicted for failing to prevent crimes committed by persons under his authority. It was clearly established in the series of trials under examination that criminal responsibility may be based solely upon inaction, namely, a breach of a duty to prevent crimes from being perpetrated by subordinates. This rule was affirmed in the *Yamashita* case[5] and recognized in many others.[6] The principles underlying this type of liability, however, are not settled. In particular, the

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[1] The Tribunal added later: 'Spoliation of private property, then, is forbidden under two aspects: firstly, the individual private owner of property must not be deprived of it, secondly, the economic substance of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort—always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation in so far as such needs do not exceed the economic strength of the occupied territory' (see *Law Reports*, vol. x, pp. 162–3).

[2] See ibid., vol. xv, pp. 103–5.

[3] At p. 557 of *Official Record* of the Judgment.

[4] See *Law Reports*, vol. xv, pp. 124–5.

[5] See ibid., pp. 43–4.

[6] See, for instance, ibid., pp. 86–7.

precedents relating to the question whether a commanding officer or other superior must be shown to have known of the commission of offences are conflicting. If such knowledge is not always essential, is liability predicated upon an unfulfilled duty to discover whether crimes are being committed or not?

Field-Marshal Erhard Milch was acquitted by a United States Military Tribunal of being implicated in the conducting of illegal experiments on the ground that it was not satisfied that he knew of their illegal nature. The Tribunal did not refer to the duty to ascertain whether they were of such a nature.[1] Similarly, in the *Trial of Oswald Pohl and Others* by a United States Military Tribunal in Nuremberg, the accused, Erwin Tschentscher, who had been a battalion-commander of a supply column and a company-commander on the Russian Front during 1941, was held not to have been responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine by members of his commands at that time. The Tribunal found that he had no 'actual knowledge' of these offences.[2]

The Judgment delivered in the *High Command Trial* provides conflicting guidance on this point. On occasions the requirement of knowledge was pressed; at times it was waived.[3] The Military Commission which tried General Yamashita seemed to assume that he had a duty to '*discover* and control' the acts of his subordinates.[4] But the majority Judgment of the Supreme Court of the United States in that case apparently left open the question whether, in certain circumstances, such a duty exists.[5]

On the other hand, the United States Military Tribunal which tried *Karl Brandt and Others* at Nuremberg from 9 December 1946 to 20 August 1947 (the *Doctors' Trial*) assumed that the accused were under a duty to make active investigations in order to discover whether experiments made by their subordinates were legal, especially in the sense that the subjects of the experiments had given their voluntary consent.[6] With reference to Karl Brandt the Tribunal said: 'Occupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.' Similarly, speaking of one of the accused before it, the Tribunal acting in the *Pohl Trial* said:

> 'Mummenthy's assertions that he did not know what was happening in the labour camps and enterprises under his jurisdiction does not exonerate. It was his duty to know.'

The Judgment delivered in the *Tokyo Trial* shows that the International Military Tribunal for the Far East was willing to assume a duty on the part of a civil or military superior to find out whether offences against prisoners of war were being committed by his subordinates.[7] The Judgment delivered in the *Hostages Trial* (*Wilhelm List and Others*) by a United States Military Tribunal in Nuremberg provides evidence for saying that a military commander will not usually be permitted to deny knowledge of the contents of reports made specially for his benefit.[8]

12. *Reprisals*. The question of legitimate reprisals has been left in some uncertainty. A distinction must be made between reprisals in the conduct of actual hostilities and

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[1] See *Law Reports*, vol. iv, pp. 89–91.

[2] See ibid., vol. xv, p. 70.

[3] See ibid., pp. 70–1, and the references there supplied.

[4] See ibid., p. 71.

[5] See ibid., vol. iv, pp. 42–4.

[6] Ibid., pp. 91–3.

[7] See ibid., vol xv, pp. 72–4.

[8] See ibid., vol. viii, p. 71. Regarding the possible extent of the responsibility of a chief of staff for the illegal acts of the subordinates of his commander there has been some difference of authority, though it has perhaps not been more than is common in many fields of law in a true common law system, and it is possible to reconcile the existing apparent differences by the process of 'distinguishing' which is familiar to the common lawyer (see ibid., vol. xv, pp. 76–8).

reprisals against the population of an occupied territory. For reasons suggested elsewhere,[1] the law as to the first aspect received little development in the war crimes proceedings which took place after 1945. The second aspect has arisen in a number of trials, but the law has been left in a state of some confusion. This is particularly regrettable in view of the fact that the trials involved the mass-killing of inhabitants of occupied territories. The Tribunal acting in the *Hostages Trial* held that, subject to a number of conditions, the killing of reprisal victims or hostages in order to guarantee the peaceful conduct in the future of the populations of occupied territories was legal.[2] Similarly, the Judge Advocate acting in the *Trial of Albert Kesselring* by a British Military Court which sat in Venice from February to May 1947, expressed the opinion that there was 'nothing which makes it absolutely clear that in no circumstances—and especially in the circumstances which I think are agreed in this case—that (*sic*) an innocent person properly taken for the purpose of a reprisal cannot be executed'.[3]

On the other hand, the Charter of the Nuremberg Tribunal, in Article 6 (*b*), and Control Council Law No. 10, in paragraph 1 (b) of Article II, both recognize without qualification the 'killing of hostages' as a war crime. So also do the Australian, Netherlands, and Chinese war crimes laws.[4] The French War Crimes Ordinance of 28 August 1944 states that 'Premeditated murder . . . shall include killing as a form of reprisal'.[5] Furthermore, Article 46 of the Hague Regulations protects 'individual life' in occupied territory, and Article 50 provides as follows:

> 'No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.'[6]

The Tribunal which conducted the *Einsatzgruppen Trial* had no hesitation in regarding Article 50 of the Hague Regulations as being applicable to reprisals. It ruled that reprisals may only be taken against persons who can be regarded as jointly responsible for the acts complained of.[7]

In the *High Command Trial* the Tribunal, faced with facts concerning reprisal killings in occupied territories similar to those proved in the *Hostages Trial*, found it 'unnecessary to approve or disapprove the conclusions of the law [announced in the Judgment delivered in the latter trial] as to the permissibility of such killings'. It was content to hold that the killings proved to have taken place would not fall within the field of what was permissible according to the Judgment in the *Hostages Trial*.[8]

The Netherlands Courts acting in the *Trial of Hans Rauter* dealt at some length with the question of reprisals in general.[9] The Court of Cassation, on appeal, adopted the view that a right of reprisal can arise only as a result of the illegal act of a state. Consequently, acts on the part of inhabitants of occupied territories, unless they can be regarded as acts of a state, do not give rise to a right of reprisal but only to a right to punish the individual offenders. When reprisals are lawful they may be taken 'against all objects which, in the given circumstances, come into consideration to this end', including the subjects of the state guilty of the criminal violation 'wherever they may be'. The Court of Cassation did not state its views as to whether or in what circumstances it is permissible to kill inhabitants detained as hostages.

Some doubt exists as to the position of members of resistance movements and members of special services sent by a free country into the territory of an ally occupied by the enemy in order to help underground movements there. In a number of trials German nationals have been sentenced for having taken part in the execution of persons who might be regarded as falling into the categories of war traitors and spies. However, the decisions of the Courts have turned on the fact that the executions took place without a fair trial. The killing even of a spy or war traitor without a previous fair trial[1] is clearly a war crime. Hence these decisions have been of little assistance in showing who may be regarded as a war traitor or a spy, or in throwing light upon the question whether resistance activities which would be clearly illegal if directed against a law-abiding occupying Power may not become legally permissible if aimed at overthrowing a rule of terror such as that imposed by the Nazi occupants. The problem remains whether the rights and duties of the occupant on the one hand and of the inhabitants of occupied territory on the other are absolute in character or are dependent for their validity upon mutual observance of the law.

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[1] See *supra*, p. 419, n. 3.

[2] See *Law Reports*, vol. viii, pp. 77–88.

[3] See ibid., pp. 12, 83, 85.

[4] See ibid., vol. v, p. 95; vol. xi, p. 93; and vol. xiv, p. 153.

[5] See ibid., vol. iii, p. 52; vol. viii, pp. 27–9; and vol. ix, p. 60.

[6] See, however, ibid., vol. viii, p. 78.

[7] See ibid., pp. 86–7.

[8] See ibid., vol. xii, pp. 84–5.

[9] See ibid., vol. xiv, pp. 123–38.

The Norwegian Supreme Court in the *Bruns Trial*, and certain Netherlands Courts, have stated that while acts of resistance on the part of inhabitants of occupied territory can legally be punished by the occupant, they are in some sense not contrary to international law. In the former trial, in the *Case of Richard Wilhelm Hermann Bruns*, the Court took the view that the activities of the Norwegian Underground Military Organization during the German occupation, which consisted, *inter alia*, of military intelligence and sabotage, did not constitute a breach of international law on the part either of the persons involved or of the Norwegian Government and therefore did not give rise to a right to take reprisals. The Court conceded, however, that the members of the Organization had no rights as soldiers since they did not wear uniform, bear marks of distinction, or carry arms openly, and could therefore be shot on capture. There may be some difficulty in accepting the view, also put forward by the Netherlands Courts, that international law places on the inhabitants of occupied territories no obligation to refrain from hostile acts against the occupant, but that the punishment of such hostile acts is permissible under that same law if it is restricted to the actual offenders.[2]

The fact that occupation is the result of an act of aggression does not alter the legal relationship between occupant and inhabitants once the occupation has been established. This principle has been tacitly accepted by the great majority of the Courts, and was explicitly laid down in the *Hostages Trial*.[3] This fact, however, has no decisive bearing on the problem whether the conduct of an occupant may not become so unlawful that the inhabitants are released from their duties owed under international law to the occupant.

G. Brand

THE DECISION OF THE NEW BRUNSWICK ADMIRALTY COURT IN ESTONIAN STATE CARGO AND PASSENGER STEAMSHIP LINE *v.* PROCEEDS OF THE STEAMSHIP *ELISE* AND MESSRS. LAANE AND BALTSER (INTERVENORS)[4]

A Judgment of importance (and, if we may say so, a model of clarity and exhaustiveness) was given in 1948 by the Honourable Mr. Justice Anglin (as he now is) then sitting as District Judge in Admiralty for the New Brunswick Admiralty District, at Saint John, New Brunswick, in an action *in rem* against the proceeds of a foreign ship which had some years earlier been arrested in a Canadian port and sold by order of the Court. The Judgment occupies nearly 50 pages and we must compress severely this comment upon it.

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[1] An attempt to derive, from a study of a number of relevant trials, the meaning of a fair trial in this sense is made in *Law Reports*, vol. xv, pp. 161–6.

[2] See ibid., vol. xiv, pp. 127–9, 135.

[3] See ibid., vol. xv, pp. 149–50.

[4] [1948] Canadian Exchequer Court Reports, 435. Since this Note was written, this decision has been reversed. A further Note will appear in the next *Year Book*.

The case arose out of the events which occurred in the Republic of Estonia on and after 17 June 1940, when a new Government was established in Estonia known as the Estonian Soviet Socialist Republic (which we shall refer to as the E.S.S.R.) and out of the subsequent nationalization of water transport by the E.S.S.R. and the vesting of the ships and other property engaged in it in the plaintiff corporation. The following is a much summarized statement of the facts based mainly on the Statement of Admissions by the parties:

(*a*) Before 17 June 1940, there was a Republic of Estonia whose existence and Government was recognized by the Government of Canada;

(*b*) On or about that date a new Government was established in Estonia, the E.S.S.R., which became a constituent Republic of the U.S.S.R. and was recognized as such by the Government of Canada, *de facto* but not *de jure*;

(*c*) On 28 August 1940 a new constitution of the E.S.S.R. declared, *inter alia*, all means of water transport to be state property, and on 8 October 1940 the Praesidium of the Provincial Supreme Soviet of the E.S.S.R. passed a decree which purported to nationalize the steamship *Elise* 'wheresoever it may be', compensation amounting to 25 per cent. of her value being payable;

(*d*) On 25 October 1940 the appropriate organ of the U.S.S.R. passed a decree providing for the organization on the territory of the E.S.S.R. of the plaintiff corporation in direct subordination to the People's Commissariat of Maritime Fleet of the U.S.S.R. with the seat of its administration at Tallinn, and the plaintiff corporation was thereupon so organized by means of an appropriate Statute;

(*e*) Before 17 June 1940 the *Elise* was owned by Laane and Baltser, the intervening defendants, who on that date were citizens of Estonia, residing and domiciled therein, Baltser residing in Sweden in 1947;

(*f*) The *Elise* left Estonia before July 1939 and never returned. During 1940 she was sailing between the United Kingdom and Canada. About 15 August 1940 she arrived at the port of Saint John in the Province of New Brunswick, and did not depart until sold in January 1941 by order of the Court after being arrested at the suit of the crew for wages and later on various other claims.

The main interest in the decision from our point of view centres on two questions.

I. The standing in a Canadian Court of the nationalization decrees of a foreign Government recognized by the Government of Canada as a *de facto* Government.

II. Whether a foreign decree purporting to nationalize a merchant ship can effectively operate upon her when she is at the time, and during the currency, of the decree, in a Canadian port.

On (I) many decisions have been given during the past thirty years, and in spite of the great variety of circumstances a certain line of authority is discernible; on (II) there was much conflict of authority, and it is here in particular that the judgment has made a notable contribution.

I

The Canadian Department of External Affairs by letter of 2 January 1947 addressed to counsel for the defendants Laane and Baltser stated, *inter alia*, that

(1) 'The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. The question of the effect of a Soviet decree is for the Court to decide.'

(2) 'The Government of Canada does not recognize *de facto* the Republic of Estonia as constituted prior to June 1940. The Republic of Estonia as constituted prior to June, 1940, has ceased *de facto* to have any effective existence.'

(3) 'The Government of Canada recognized that Estonia has *de facto* entered the Union of Soviet Socialist Republics but has not recognized this *de jure*. It is not possible for the Government of Canada to attach a date to this recognition.'

(4) 'The Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia. It is not possible for the Government of Canada to attach a date to this recognition.'

The learned Judge first held that the plaintiff corporation, as a corporation organized under the laws of the U.S.S.R., is 'a Government recognized as *de jure* by Canada and having normal legislative power', and 'may of course sue in our Courts' (p. 443).

Here a few words must be said concerning an English case, usually called the *Vapper* case,[1] in which the Estonian State Steamship Line was also a party, and in which the judgment of Atkinson J. was affirmed by the Court of Appeal. Both cases arose from the same sequence of political events in Estonia. The *Vapper* case is unusually complex and has already been fully analysed in this *Year Book*.[2] The only point of contact which will be mentioned here is that in both cases documents containing the same legislative instruments were submitted to the Court, but in neither case was the Court satisfied that it had enough evidence to enable it to say that these instruments had actually operated so as to divest the property of the private Estonian shipping company in the ship and vest that property in the public Estonian State Steamship Line. It is one thing for legislation to order the nationalization of private property; it is another thing to carry out the process. It does not suffice to throw a bundle of documents at the Court; 'the fact and content of foreign law must be proved by expert evidence.'

But in the Canadian case the learned Judge availed himself (p. 445) of an admission by the parties to the effect that the relevant legislative instruments 'purport to transfer and vest in the plaintiff [the Estonian State Line] all rights, title and possession in, to and out of the said steamship *Elise*', and was thus able to find for the plaintiff on this point (p. 446).

It was next contended that 'the decrees and statute of the *de facto* government in question' were 'contrary to the constitution of Estonia as it existed prior to June 17, 1940', of which the learned Judge said: 'I do not doubt that this may be true.' But he went on to point out that he was precluded by the letter from the Canadian Department of External Affairs quoted above from embarking upon any such inquiry, and referred to the decision of the Court of Appeal in *Banco de Bilbao* v. *Sancha*[3] arising out of the recent Spanish Civil War, an American decision *The Maret*,[4] and an Eire decision *The Ramava and The Otto*,[5] both arising out of the events of 1940 in Estonia.

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[1] *A/S Tallinna Laevauhisus and Others* v. *Tallinna Shipping Company Ltd., and Estonian State Steamship Line* (1946), 79 Lloyd's List Law Reports 245; (1947), 80 ibid., 99.

[2] 23 (1946), p. 384; 24 (1947), p. 416.

[3] [1938] 2 K.B. 176; this *Year Book*, 19 (1938), p. 241; *Sub. tit. Banco de Bilbao* v. *Rey*.

[4] (1946), 145 Fed. R. 2nd 431.

[5] [1942] Ir. R. 143.

Before proceeding to II, the question whether the relevant legislative acts, whether Russian or Estonian, were *intra* or *ultra vires*, the learned Judge found as facts that the dates of the relevant legislative acts were as follows: (*a*) of the nationalization decree, 8 October 1940; (*b*) of the decree organizing the plaintiff corporation upon the territory of the E.S.S.R., 25 October 1940; (*c*) of the Statute incorporating the plaintiff corporation, 29 October 1940; and further found a fact of capital importance, deducible from the admissions of the parties, namely, that throughout the period covered by these three dates the *Elise* lay in the port of Saint John, New Brunswick. The importance of this group of facts will become clear presently. Meanwhile, however, the learned Judge had to clarify or determine five matters, which we shall compress as much as possible, being content to refer the reader to their meticulous treatment in the judgment.

(i) He examined the admissions of the parties as to which of the two Governments, E.S.S.R. or U.S.S.R., enacted the decrees and Statute in question, and concluded that 'for the purposes of this case, the legislative action of both the E.S.S.R. and the U.S.S.R. with respect to Estonia is to be treated as taken by a *de facto* government'.

(ii) The question whether 'the decree and Statute organizing the plaintiff corporation (could) be impugned on the ground that there is no evidence of the legislative authority of the enacting body', the learned Judge answered by deducing from the authorities 'that the court has a right and duty, even where the foreign legislative act was enacted by a state duly recognized, to examine its constitutional validity';[1] that this examination may be accomplished through appropriate evidence;[2] such evidence being lacking, he turned to the admissions of the parties and found it to be 'implicit therein that the said decree and Statute were within the constitutional powers of the *de facto* government in question'.

(iii) He rejected the argument of the defendants that the effect of the temporary supersession of the authority of the E.S.S.R. and the U.S.S.R. by Germany during her occupation of Estonia between August 1941 and some date in 1944 was to sweep away and nullify the relevant decrees and Statute, pointing out that what mattered was that the former authority was re-established in 1944 and referring to a passage in Wheaton cited in *Republic of Peru* v. *Dreyfus Brothers*.[3]

(iv) On the questions whether retroactive effect must be given to the recognition by Canada in January 1947 of the *de facto* government of Estonia, and, if so, to what date, the learned Judge, following *Luther* v. *Sagor*,[4] said that the effect of recognition must date back to the original establishment of the Government, and he followed Atkinson J. in the *Vapper* case[5] in fixing that event at 6 August 1940. What matters is that it occurred before October 1940.

(v) His fifth question was whether there is any difference in legal effect, with reference to its legislative power, between a *de facto* and a *de jure* Government. To this he had no difficulty in giving an affirmative answer, following a line of English authority culminating in Lord Atkin's speech in *The Arantzazu Mendi*,[6] and concluded that 'a *de facto* Government has no less power than a *de jure* Government to enact legislation with the intent that it apply extraterritorially'.

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[1] The learned Judge referred to *Re Amand* (*No. 1*), [1941] 1 K.B. 239, 253; this *Year Book*, 21 (1944), p. 190; Mann, 'The Sacrosanctity of the Foreign Act of State', in *Law Quarterly Review*, 59 (1943), pp. 42, 44, 159; and McNair, *Legal Effects of War* (2nd ed. 1944), pp. 374–7. The English authority is scanty.

[2] Referring to *Re Amand* (*No. 1*), *supra*, and *Lorentzen* v. *Lydden & Co.*, [1942] 2 K.B. 202; this *Year Book*, 21 (1944), p. 185.

[3] (1888) 38 Ch.D. 348, 360.

[4] [1921] 3 K.B. 532, 549.

[5] *Supra*.

[6] [1939] A.C. 256, 264; this *Year Book*, 21 (1944), p. 180.

II

We now move from the area of public to that of private international law, and reach the point on which, as it seems to us, the Judgment makes its major contribution; that is: 'In the eyes of Canadian law are the legislative acts of the *de facto* government in question *intra vires* in purporting to apply to the *Elise* while in Canadian territorial waters, and, if so, are they to be recognised and implemented?' Let us remind ourselves that at all material times the *Elise* was lying in a Canadian port. Let us add that her owners were nationals of, and domiciled in, Estonia, that there was no evidence that they or the master had attorned to the authorities of the *de facto* Government in respect of her after the purported nationalization, and that in these circumstances 'the national character of the *Elise* is to be identified with the country over which the said *de facto* government had jurisdiction'. There was no evidence as to the flag she flew. The learned Judge also held that until her arrest on 9 November 1940, at Saint John, at the instance of the crew for wages, she had been trading backwards and forwards across the Atlantic and was thus *in transitu* in the language of private international law, and had made no 'legal contact' in Canada.

That cleared the ground and raised the simple issue whether a decree of nationalization passed by the Government of a state purporting to operate upon its merchant ships wheresoever they may be has any legal effect upon those ships in the national or territorial waters of State Y, which State Y must recognize or implement. It is probably true to say that there was no direct and positive judicial authority in favour of an affirmative answer to this question, and that the only positive and direct judicial authority supporting a negative answer was to be found in the Scottish decision, *The El Condado*.[1] After an exhaustive survey of the decisions[2] and the literature[3] the learned Judge held that 'in the eyes of Canadian law the legislative acts of the *de facto* government in question were *intra vires* in purporting to have extraterritorial effect'. He pointed out that the Court of Session in *The El Condado* had relied overmuch upon a dictum by Hill J. in *The Jupiter* (*No. 3*), which was not followed in *Lorentzen* v. *Lydden & Co.*; and he derived the main support for his conclusion from the special character of a ship as the object of property, at any rate from the point of view of private international law, as recognized both by Dicey and by Westlake, and from the way in which Canada and other states do not hesitate to legislate with regard to their merchant ships when lying in foreign ports and territorial waters. With respect, we believe this conclusion to be right.

There remain, however, further points.

(i) Does such immunity as the *Elise* might enjoy in a Canadian court prevent the court from implementing the decree of nationalization thus held to be prima facie operative upon the ownership of her? She must be regarded as a private merchant ship unless and until the court holds that the decree of nationalization has actually operated upon her so as to convert her into a public ship. The learned Judge, after referring to *Cunard* v. *Mellon*, *supra*, *Wildenhus*'s case,[1] and *Chung Chi Cheung* v. *The King*,[2] which, however, as he points out, concerned a public ship, held[3]

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[1] [1939] S.C. 413; 63 Lloyd's L.L.R. 83, 330; this *Year Book*, 21 (1944), p. 183 (where this part of the decision was adversely criticized); *Annual Digest*, 1938–40, Case No. 77; see also ibid., Case No. 90.

[2] In particular, *Cunard S.S. Co.* v. *Mellon* (1923), 262 U.S. 100, 129; *Lorentzen* v. *Lydden & Co.*, *supra*; *The Jupiter* (*No. 3*), [1927] P. 122; ibid. 250; this *Year Book*, 9 (1928), p. 176 (where it is essential to notice that the Soviet decrees did not purport to operate extraterritorially and the *Jupiter* was not within Soviet jurisdiction at the relevant time, so that the oft-quoted dictum of Hill J. was doubly *obiter*); and *The Navemar* (1939), 64 Lloyd's L.L.R. 220.

[3] Dicey, *Conflict of Laws* (5th ed.), p. 996; Westlake, *Private International Law*, 7th ed., pp. 202 and 212; Hellendall in *Canadian Bar Review*, 1939, pp. 7 and 105–11; McNair, *Legal Effects of War* (2nd ed. 1944), pp. 378, 382. Reference may also be made to McNair, 'The Requisitioning of Merchant Ships', in *Journal of Comparative Legislation and International Law*, 3rd series, vol. xxvii, Parts III and IV (1945), pp. 68–78, and in *Transactions of the Grotius Society*, 31 (1946), pp. 30–58 (same article).

> 'that in the circumstances of the present case the national character of the *Elise* is to be identified with the country controlled by the *de facto* government in question, and that in Canadian law there may be implied an immunity to the extent of permitting the legislative acts of that government to take effect upon the proprietary rights of the *Elise* while at Saint John'.

We must confess to a little difficulty on this point. (*a*) In relation to private merchant ships in foreign ports, are the so-called 'immunities' (at any rate within the British Commonwealth) anything more than the consequences of voluntary abstention from the exercise of local jurisdiction? (*b*) In so far as there are any immunities (as clearly there are in the case of a foreign public ship), surely in this case those immunities belonged to the state or Government with which the *Elise* was identified. The learned Judge is clearly speaking of legal immunities; see top of p. 469: 'This question involves the determination of the extent of the immunity to be accorded in our law to a foreign merchant ship calling at our ports in the course of international trade.' 'Accorded to a foreign merchant ship' is perhaps an elliptical expression. Does it mean an immunity accorded to the state of Estonia in respect of merchant ships 'identified' with it, or an immunity accorded to the owners of the *Elise* in respect of the *Elise*? In the former case it seems to mean an immunity from Canadian law which enables Estonian law to penetrate through the gap in the legal curtain and operate. It cannot mean an immunity enjoyed by the owners because it would be a strange kind of immunity that resulted in the loss of their ship. We venture, with great respect, to wonder whether the whole of the subtle discussion of this point could not have been avoided. Once the learned Judge had held that the decree of nationalization (subject to the further and final point to be discussed) was capable of operating in a Canadian port, why was it necessary to establish any immunity from Canadian law? Is it necessary to create a legal vacuum before the foreign law can operate? Surely there are many cases where two systems of law can operate on the same object or in the same place.

(ii) The final point is a short one. The defendants contended that the decrees and statute were 'confiscatory in nature and not recognized by our law as effective in transferring property outside the jurisdiction of the promulgating authority'. The amount of compensation fixed by the nationalizing decree was 25 per cent. of the ship's value. The answer is twofold. (*a*) That objection, whatever may be its legitimate sphere of action, cannot arise when a foreign state is dealing with property within its own sphere of jurisdiction, and particular attention must be drawn to the learned Judge's observations on p. 478 to the effect that the crucial point in *Luther* v. *Sagor*, *supra*, and *Princess Olga Paley* v. *Weisz*[4] is that the Soviet decrees of nationalization operated upon the property in question while it was 'within the ambit of the jurisdiction of' the Russian Soviet State. In those two cases the property was *physically* upon Soviet territory when the decrees operated; the *Elise*, having regard to the previous legal findings in this case, was deemed by law to be within the ambit of Estonian jurisdiction, so that (p. 478)

> 'In the result, a court is not in such cases enforcing foreign law with respect to chattels having a local *situs*, but is recognizing and protecting rights acquired under foreign law. Hence the alleged confiscating character of Soviet nationalization decrees is immaterial.'

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[1] (1886), 120 U.S. 1, 12.

[2] [1939] A.C. 160; this *Year Book*, 20 (1939), p. 146.

[3] At p. 472.

[4] [1929] 1 K.B. 718; this *Year Book*, 11 (1930), p. 233.

(*b*) Had it been material, it seems probable that, for reasons given, the learned Judge would not have attributed a confiscatory character to them.

In conclusion, he awarded the defendants Laane and Baltser their 25 per cent. compensation out of the fund in Court representing the proceeds of the *Elise* holding on the admissions that the *Elise* vested in the plaintiff corporation *cum onere*.

There has been much litigation on these points in the United Kingdom during the past thirty years, and this Judgment will be studied with great interest. It resolves certain doubts, and, with respect, we submit that (subject to our hesitation on the question of the immunity of a foreign merchant ship) it resolves them rightly.

A. B. C.

CLAIMS OF DIPLOMATIC IMMUNITY: SOME SPECIAL ASPECTS

Price v. *Griffin*—a case which probably deserves a more adequate report than it has received so far[1]—revealed a fresh aspect of the relationship between the English Executive and Judiciary in matters involving international law. There were also other features which call for comment. A letter was written by the Foreign Office to the Court claiming diplomatic immunity on behalf of a consular officer; it was received and read out by the Judge before the case was called on; and it was accepted by him as precluding him from continuing with the case. Such procedure seems to be without precedent.

The action was for breach of promise of marriage; the defendant was the United States Vice-Consul in London. At the sitting of the Court on 19 February 1948, Birkett J. announced that he had received a communication from the Secretary of State for Foreign Affairs to the effect that the United States Chargé d'Affaires had requested him (the Foreign Secretary) to certify to the Court that the defendant was a member of the staff of the United States Ambassador and was entitled to diplomatic immunity. A certificate was enclosed, but whether it certified in terms that the defendant was entitled to such immunity, or dealt only with his status, does not appear. From the wording of the Foreign Office letter, however, it seems a fair assumption that the certificate went also to immunity. The letter continued that details of the case had been reported by the American Embassy to the State Department with a request for instructions on whether immunity should be waived in order to permit the action to proceed. After the Judge had read this letter Counsel for the plaintiff opened his case and stated that the defendant was American Vice-Consul in London; but he was stopped. The Judge said that he could not listen to any statement of facts. The certificate was binding on the Court and he was without jurisdiction. Counsel was, however, allowed to read 'so that it might be before the Court' a letter from the defendant's solicitors to the plaintiff's solicitors, to the effect that the defendant had informed them that, as he was clothed with diplomatic immunity, the American Embassy had ordered him not to appear in person or by attorney to answer the action pending receipt of instructions from the State Department. He would therefore not be represented in Court at the hearing. The case was stood out with liberty to restore after fourteen days.[2]

The first point of interest in *Price* v. *Griffin* is the method in which the claim of immunity was conveyed to the Court. It was not done by the defendant or his Counsel. The initiative came from the sending state. This approach is reminiscent of that used in obtaining the Suggestion of the American State Department in matters of immunity.[1] The ambassador of the foreign state affected presents a note to the Secretary of State setting out the facts on which immunity is claimed for a diplomatic person or for state-owned property, and requesting that they be conveyed to the Court. But there the resemblance ends; in the United States the communication is normally made to the Court through the District Attorney and not by a letter.[2]

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[1] There was a note of the case in *The Times* newspaper of 20 February 1948, and an account of it in *International Law Quarterly*, 2 (1948), p. 266. I am indebted to the solicitors for the plaintiff and the defendant respectively for assistance in preparing this note.

[2] In the event, it would seem that, when eventually the United States Ambassador received instructions from his Government to waive Mr. Griffin's immunity, the Foreign Office was so informed and notified the Court. When the action was allowed to proceed on 26 April 1948, defendant's Counsel was at pains to make it clear that he had not meant to hide behind the claim for immunity, which was not of his own seeking.

Nor is the sending of a letter uninvited by the Foreign Office to the Court a normal method in England. The claim of immunity is usually made during the course of the action, and the Foreign Office supplies the desired certificate or information as to the status, &c., of the person concerned, on request, to the Court[3] or to one or both of the litigants,[4] whichever has requested it. The letter or certificate is then read out in court by the Judge or by counsel as the case may be. Alternatively, in cases of importance, the Law Officers of the Crown have intervened in the proceedings to claim immunity for diplomatic persons[5] or state-owned vessels.[6] And there have been cases in which the Court has of its own initiative either directed its officers to make the necessary inquiries[3] or invited the Law Officers to appear and address the Court on the status of, for example, a ship for which immunity is claimed.[7] There is some novelty, therefore, in the Foreign Office's action in sending its certificate unasked by the defendant, and in particular in its certifying, as we have presumed that it did, that he was entitled to diplomatic immunity. The Foreign Office has not ordinarily in the past certified more than the status of the individual, leaving it to the Court to find whether or not the individual enjoyed diplomatic immunity.[8]

The second point deserving of mention is Mr. Griffin's actual status. He was described in the pleadings as the American Vice-Consul, while the letter from the Foreign Office describes him as a member of the staff of the United States Ambassador. Since 1924 the United States has, like Soviet Russia and Germany, amalgamated its diplomatic and consular services into a common foreign service, and this case is a further example of the difficulties that may be consequent upon such an amalgamation. Consuls are not diplomatic envoys and therefore do not enjoy diplomatic immunity,[1] save occasionally by courtesy or under a treaty;[2] their immunity from civil process is confined to actions brought in respect of acts performed in the course of their official duties.[3]

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[1] See Lyons, 'Conclusiveness of the "Suggestion" and Certificate of the American State Department', in this *Year Book*, 24 (1947), pp. 116, 117.

[2] In *The Ucayali* (1942), however, the State Department sent a letter to the Court as well (47 F. Supp. 203; 318 U.S. 578; *Annual Digest and Reports*, 1941–2, Case No. 53).

[3] As, for example, in *The Charkieh* (1873), L.R. 4 A. & E. 59; L.R. 8 Q.B. 197; *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149 (where the request was to the Secretary of State for the Colonies); *The Gagara*, [1919] P. 95. See McNair in this *Year Book*, 2 (1921–2), at p. 65, footnote, as to the ways in which English judges 'make enquiry of [the Executive] upon facts of international status'.

[4] As, for example, in *Musmann* v. *Engelke*, [1928] 1 K.B. 90; *Annual Digest*, 1927–8, Case No. 245. See next note. In *Luther* v. *Sagor*, [1921] K.B. 456, the Foreign Office wrote a letter to the solicitors for M. Krassin, who was not a party to the case.

[5] In *Musmann* v. *Engelke*, *supra*, the defendant first filed a certificate from the Foreign Office that his name appeared on the Foreign Office List, and, later in the proceedings, the Attorney-General appeared at the request and on behalf of the Foreign Office to support that statement.

[6] As in *The Parlement Belge* (1880), L.R. 5 P.D. 197, and in *Duff Development Co., Ltd.* v. *Government of Kelantan and Another*, [1924] A.C. 797; *Annual Digest*, 1923–4, Case No. 124.

[7] As in *The Constitution* (1879), 4 P.D. 39.

[8] In *A. M. Luther* v. *James Sagor & Co.*, [1921] 1 K.B. 456, 3 K.B. (C.A.) 532, the Foreign Office wrote to the solicitors for M. Krassin a letter stating that he was the authorized representative of the Russian Government, and went so far as to add that he was regarded as 'one . . . who should be exempt from the processes of the Court'. In a footnote to an article on the 'Conclusiveness of the Foreign Office Certificate' in this *Year Book*, 23 (1946), at p. 267, I submitted that 'Such a suggestion would probably not have been contained in a formal Foreign Office certificate'. If the present assumption that the certificate in *Price* v. *Griffin* went not only to status but also to immunity is correct, then the former submission is shown to be wrong.

The position of persons who occupy a dual status, who are not only consuls but also diplomats, was considered in *Musmann* v. *Engelke*.[4] The defendant was a consular secretary; he claimed that he was employed on the staff of the German Embassy. When application was made by the Embassy to the Foreign Office for the necessary information about him to be given to the Court, the Attorney-General made it his business to find out what this employment consisted of and how far, if at all, Engelke qualified for immunity. The Attorney-General reported to the Court that he was satisfied: 'This man performs some service on the right side of the line between consular service and ambassadorial service.' Germany, he added, had in 1919 amalgamated the two services as one department of the German Foreign Office. The Attorney-General was at pains to make it clear that His Majesty's Government did not accept the view that thereby Germany was entitled to claim immunity for persons who performed only consular functions. The Foreign Office had inquired and had informed the Court exactly what diplomatic functions Engelke was performing.

In the present case, however, for aught that appears to the contrary, no inquiry was made, and certainly the Court was not informed, about the service Mr. Griffin performed at the American Embassy. Yet on the mere announcement by the Foreign Office that he was in fact employed there the Court accorded him the full immunity of a diplomat.

The third point of interest is the way in which Mr. Griffin's waiver of immunity was controlled by his home Government. It is a commonplace that the right to diplomatic immunity is the right of the sending state. In the case of an envoy, therefore, according to Oppenheim,[5] a waiver of immunity is said to require the consent of the Government of that state; in the case of a subordinate, the consent of his official superior.[6] 'But it is not clear', says a footnote, 'what steps an English Court will take to ascertain whether or not that consent has been waived [? sc. granted].' *Price* v. *Griffin* may in some measure have provided the answer to this query. It is true that although Mr. Griffin was a subordinate member of the American Embassy, permission to waive his immunity had to be obtained from the State Department. But whether such permission is to be given by the Ambassador or by the Head of his Ministry is clearly a matter of internal administration. It is also probably correct to say that in the past, English courts have not sought to inquire whether a defendant diplomat—or anyone else—has obtained the necessary consent to be sued. They have assumed *omnia rite et sollenniter esse acta* and that a person who has entered an unconditional appearance, as Mr. Griffin seems to have done, had every right to be before the Court. This, perhaps inevitable, assumption has made possible the many difficulties in litigation which have arisen from delayed claims of immunity and which comprise a fourth point to be noted in connexion with this case. If the principal leading cases on such claims are examined, it will be seen that in a large number of them the defendant has waived or appeared to waive his immunity until somewhat late in the proceedings. So long ago as 1737, in *Barbuit*'s case,[1] privilege was not claimed by the 'agent of commerce' of the King of Prussia until ten years after action brought, after accounts had been decreed, taken and passed, and the defendant attached for non-payment. A similar passivity on the part of Drouet, the First Secretary of the Belgian Legation, in respect of his immunity was the subject of unfavourable comment by the Court 130 years later in *Taylor* v. *Best*.[2] Jarvis C.B. said:

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[1] Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 743. Cf. *Heathfield* v. *Chilton* (1767), 4 Burr. 2016; *Viveash* v. *Becker* (1814), 3 M. & S. 284.

[2] Oppenheim, op. cit., p. 753; and see Beckett in this *Year Book*, 21 (1944), pp. 34–50. See also the next note.

[3] Cf. Anglo-American Consular Convention, 1949, Art. II (1) (*a*) (see this *Year Book*, 25 (1948), p. 284).

[4] [1928] 1 K.B. 90, 94; [1928] A.C. 433.

[5] Op. cit., vol. i (7th ed. 1948), p. 715.

[6] 'The privilege is not the privilege of the servant but of the Ambassador' (Bayley B. in *Fisher* v. *Begrez* (1833), 2 Cr. & M. 240, 243).

> 'I am aware of no case in which, where there are several defendants and the action has been allowed to go on to trial, the proceedings have been stayed upon the application of one of the defendants. Such a course would be obviously unjust to the other defendants, seeing that the expense they had already incurred would thereby be rendered useless.'

And, it may here be added, where there is only one defendant, equally unjust to the plaintiff.

Again, in 1914, after sixty years, in *Re Republic of Bolivia Exploration Syndicate*,[3] we find the Second Secretary of the Peruvian Legation, Señor Lembcke, maintaining the tradition of Herr Barbuit and M. Drouet (and now continued by Mr. Griffin) and deferring for a year after the commencement of proceedings his claim to immunity. He entered an unconditional appearance, asked for further time to file evidence and filed evidence on the merits, stating his official position but not raising any question of privilege. The late objection on the ground of privilege was taken at the hearing of a misfeasance summons. The claim, which was put forward not by Foreign Office letter but by Counsel for Lembcke, was made 'with the sanction and at the wish of' the Peruvian Legation. In this respect the case of *Price* v. *Griffin* is analogous: there, too, the Foreign Office took action at the instance of the Embassy concerned. Moreover, any pretended waiver of immunity by entering appearance and so on was cut short by the Foreign Office letter, which in effect reminded the Court and the parties that the privilege was not for Griffin to waive.

The last point which seems just worth mentioning is that in *Price* v. *Griffin* there was no reference either in the Foreign Office letter, or in the remarks of the Judge, or in those of Counsel, to the Diplomatic List. This, though not published for the benefit of litigants,[4] can be of great assistance to them, and the presence or absence on it of a person's name is usually made the subject of comment when that person claims diplomatic privilege.[5] If there is any significance in that omission it may be that the

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[1] Cas. temp. Talbot 281.

[2] (1884), 14 C.B. 487, 519. The Court added that Drouet had 'courted the jurisdiction . . . and we ought not to interfere'. He was sued only as a joint-contractor for ascertaining the liability of the other defendants, and it was held that, as the action would not result in any interference with his person or property, the Diplomatic Privileges Act, 1708, did not apply. Immunity was therefore refused. This case is sometimes cited as authority for the proposition that 'if an ambassador attorns to the jurisdiction he could not afterwards set up his privilege'. See, for example, Pitt Cobbett, *Leading Cases on International Law*, vol. i (4th ed. 1922), p. 309, repeated in 6th ed. (1947), p. 328; and also Wheaton, *International Law*, 6th (English) ed. by Keith (1929), p. 457. But *Taylor* v. *Best* does not go so far. (Cf. also Westlake, *Private International Law*, 7th ed. by Bentwich (1925), p. 278.)

[3] [1914] 1 Ch. 139. In this case the diplomat concerned was again not the sole defendant; his claim of privilege was nevertheless allowed.

[4] See the Attorney-General's statement in *Musmann* v. *Engelke*, [1928] 1 K.B. at p. 94.

[5] See, for example, *In re Suarez*, [1918] 1 Ch. 176; *Musmann* v. *Engelke*, *supra*; *The Amazone*, [1939] P. 322, [1940] P. 40 (C.A.).

Executive to-day prefers an *ad hoc* communication to the Court in matters such as claims of immunity.

A. B. Lyons

RECOGNITION OF STATES BY THE UNITED NATIONS

In the Resolution approving the terms of a request to the International Court of Justice for an Advisory Opinion in the matter of reparation for injuries incurred during the service of the United Nations, adopted by the General Assembly on 3 December 1948,[1] reference was made to capacity to bring an international claim 'against the responsible *de jure* or *de facto* government'. Commenting on this in the written proceedings before the International Court of Justice, the United States Government remarked:

> 'Whether the Government responsible for the loss or injury has been recognized as *de jure* or *de facto* in character by certain States is immaterial, as the United Nations, as such, does not recognize States.'[2]

While it may be assumed, at all events for the purposes of this Note, that the nature of the recognition which has been granted to the defendant state by other states is irrelevant, it seems useful to examine whether the emphatic assertion that the United Nations, as such, does not recognize states, accurately represents the legal position. The issue cannot be dismissed as being entirely theoretical. This is not only on account of certain specific references in the Charter, but also because of the inherent dynamic tendencies of the international organization and the new direction given by the International Court in the *Reparation* case[3] itself to the future development of the law of international institutions.

It may be noted that the Secretary-General, in his Memorandum of 7 October 1948,[4] which initiated the discussions in the General Assembly, did not refer to the nature of the recognition which the defendant state might enjoy. That Memorandum states clearly the view of the Secretary-General that the United Nations has capacity to present a claim under international law against a state, whether a Member or non-Member of the United Nations; perhaps somewhat inconsequentially the Memorandum suggests that the Secretary-General should proceed to present claims to the 'State or authorities' concerned. This reference to 'State or authorities' did not survive the Sixth Committee. The Court itself did not devote any time to the nature of the recognition. It simply understood the phrase 'responsible *de jure* or *de facto* government' appearing in the request for the Advisory Opinion as meaning state.[5] It is, therefore, in that sense that its Advisory Opinion is to be understood.

Before discussing the problem of whether the United Nations as such can recognize states, it is desirable briefly to recall those provisions of the Charter which use the word 'state'. Article 2, paragraph 4, imposes an obligation on Members to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. Paragraph 5 of the same article imposes an obligation to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. Paragraph 6 directs the Organization to ensure that states not Members of the United Nations act in accordance with the principles of the Charter so far as may be necessary for the maintenance of international peace and security. Paragraph 7 mentions the 'domestic jurisdiction of any state'. Articles 3 and 4, dealing with membership, refer to states. Paragraph 2 of Article 11, dealing with the functions and powers of the General Assembly, refers to questions brought before the Assembly by 'a state which is not a member of the United Nations'. Article 32 imposes on the Security Council a duty to invite 'any state which is not a Member of the United Nations' to participate in certain of the deliberations of that body. Article 35 enables 'a state which is not a Member of the United Nations' to bring certain disputes to the attention of the Security Council, and prescribes the conditions for their so doing. Article 50 mentions preventive or enforcement measures 'against any state' and gives rights to 'any other state' to consult the Security Council with regard to the solution of special economic problems arising therefrom. Articles 53 and 107 refer to 'enemy states'. Article 59 requires the Organization to initiate negotiations 'among the states concerned' for the creation of new specialized agencies. Article 77 refers to 'states responsible for' the administration of territories voluntarily placed under the trusteeship system. Article 79, which is concerned with the terms of trusteeship agreements, uses the expression 'states directly concerned'. Article 80 mentions the rights of 'any states'. Article 93 lays down the procedure by which 'a state which is not a Member of the United Nations' may become a party to the Statute of the International Court of Justice. Article 110 refers to ratification by the 'signatory states'. A similar reference is made in Article 111.[1] Similarly, in the Statute of the International Court of Justice we find several references to states, of which the most important is paragraph 1 of Article 34: 'Only states may be parties in cases before the Court.'[2]

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[1] *Official Records of the Third Session of the General Assembly, Part I, Resolutions*, p. 172.

[2] *Reparation for Injuries suffered in the Service of the United Nations*, Pleadings, Oral arguments, Documents, at p. 21. The letter was signed by the Acting Legal Adviser, Mr. Jack B. Tate.

[3] *Reparation for Injuries suffered in the Service of the United Nations*, Advisory Opinion (*I.C.J. Reports*, 1949, p. 174).

[4] Doc. A/674.

[5] *Reparation, &c.*, Advisory Opinion, at p. 177.

It is clear then, that, leaving aside the references to signatory states, enemy states, Member states, and states responsible for trust territories, all of which can be easily identified by external criteria, and apart from the particular problem of the phrase 'states directly concerned' in connexion with the trusteeship system, the Charter contains provisions which may be applied to, or may even be applicable, directly or indirectly, to all or any states, whether or not they may be identifiable by these external criteria, conferring upon them rights and possibly duties.[3] That being so, it is necessary to consider how far the Organization itself can and does 'recognize' states, and what is the effect of its action.

The first question that has to be asked, then, is: Does the Organization possess the capacity to recognize a political body as a state? While there is no doubt, following the recent Advisory Opinion, that the Organization has a degree of international personality, and therefore international capacity, there is still room for debate as to the extent of this personality and capacity. There is a possible difference of opinion between those who would restrict the effect of the international personality and capacity to do that which is required in order to enable the Organization to perform the functions for which it was created, and those who would say that its international personality and capacity are unlimited except in so far as the very nature of the Organization makes it impossible for it to do things which only fully sovereign states, by their nature, can do. Whichever of these views is correct, it seems that, in general, the Organization has enough capacity to be able to recognize a political organization as a state, at all events if it is necessary for it to do so for the performance of the functions for which the Organization was created. In view of the Advisory Opinion referred to above, and in the light of the many manifestations of international personality which, in one way or another, we can see to-day around the United Nations, it is probably not necessary to pursue further this aspect of the matter, the more so as the Charter does, in some circumstances, require a decision as to the statehood of certain bodies. The practical aspect is the more important and the more difficult in view of the fact that the Organization itself does not operate through a single board of directors, as does a corporation formed under civil law, but through a number of principal organs, as are described in paragraph 1 of Article 7 of the Charter, and also, at times, even through subsidiary organs under paragraph 2 of the same article. This means that what has to be considered is not so much the capacity of the Organization itself, as that of its organs, to recognize states, and the effect which the actions of these organs have, both on the Organization as a whole and on the individual Members.

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[1] It might be of interest to make a similar brief survey of the Covenant of the League of Nations. This used the expressions 'States named in the Annex' as well as 'any fully self-governing State' in Art. 1. Art. 8, dealing with disarmament, refers to the 'geographical situation and circumstances of each State'. One of the amendments to Art. 16 referred to a 'Covenant-breaking State and the nationals of any other State, whether a member of the League or not'. Art. 17 used the expression 'a State which is not a member of the League'.

[2] According to the Court's *Yearbook*, 1948–9, this fact is not generally understood (see p. 31). The same provision appeared, of course, in Art. 34 of the Statute of the Permanent Court of International Justice. The question whether a political organization offering itself as a party is a state, is one to be decided by the Court (see Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), at p. 392).

[3] In the *Reparation, &c.*, Advisory Opinion, at p. 185, the Court made the pregnant observation that 'fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, *and not merely personality recognised by them alone . . .*' (italics supplied). This plays havoc with the rule *pacta tertiis nec nocent nec prosunt* and with many other previously accepted notions of international law.

It is submitted that the correct solution is found in the line of reasoning adopted by the International Court of Justice in *Admission of a State to the United Nations* (*Charter, Art. 4*), *Advisory Opinion*.[1] Here, referring to the conditions of membership laid down in the Charter (one of which, of course, is that the applicant is a state), the Court said:

> 'All these conditions are subject to the judgment of the Organization. The judgment of the Organization means the judgment of the two organs mentioned in paragraph 2 of Article 4, and, in the last analysis, that of its Members.'

In other words, it is believed that, applied to the matter which we are discussing, the principles which emerge from that *dictum* are that

(*a*) each organ of the United Nations has the capacity to recognize a political body as a state within the terms of its own competence as defined in the Charter, and for the purposes of the application of the article out of which the demand for recognition as a 'state' was made; and

(*b*) in the last analysis the judgment of the General Assembly, being that of the Members, will be decisive.

If this view is correct it would mean the carrying over into the political and functional side of the Organization's activities a rule parallel to that which is found in connexion with the application of Article 34 of the Statute of the International Court of Justice, according to which, if necessary, the Court itself will decide whether one or both of the parties to a case is a state. The difference is that whereas the Court would decide purely on legal grounds, the other organs, not being legal organs, could be entitled to take other matters into consideration in reaching their decision.

These considerations lead to the conclusion that the word 'state' as used both in the Charter and in the wider context of United Nations law may not always connote the same object. When the matter under consideration is the applicant's qualifications for membership, then by the combined effects of Article 4 and Article 78 of the Charter the word probably has a meaning similar to that spelled out in Article 1 of the Covenant of the League of Nations. Professor Scelle, for example, in presenting the arguments of the French Government in the proceedings in the Advisory Opinion on the *Admission of a State to the United Nations*, saw the connexion between the dispositions of Geneva and those of San Francisco.[1] However, no precise definition of the term 'state' has been laid down, and the debates which have occasionally taken place upon the question show that the Members' attitudes exhibit great variations, both in approach and in substance.[2] Moreover, the fact of the applicant's being a state, as the first condition of membership, has to be established to the independent satisfaction first of the Security Council and secondly of the General Assembly. This means that, under the very terms of the Charter, the decision of one is not binding on the other. The position is similar in the case of action under Article 93 of the Charter relating to the admission of non-Member states to the Statute of the International Court of Justice. Here again the fact of the applicant being a state is the first condition, and here again that fact has to be established to the independent satisfaction first of the Security Council and secondly of the General Assembly.[3] There is probably no difference in substance in the nature of statehood required of the applicant in these two cases.

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[1] *I.C.J. Reports*, 1948, p. 57, at p. 62.

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[1] *Admission, &c.* case, *Pleadings, Oral Arguments, Documents*, at p. 65.

[2] For an analysis of the various points of view put forward in the debates in the Security Council on this matter, see particularly Mr. Kerno's Statement before the International Court in the *Admission* case (*Pleadings*, &c., pp. 42 ff.). In that case, too, interesting viewpoints appeared. Thus the Australian Government was of opinion that the existence of a state as such in international law implies sovereign control over a definite area of territory, the organization of a Government capable of maintaining control of the territory and of the people residing there, and independence of foreign control (ibid., p. 30). Professor Scelle put the emphasis on a new element, that of treaty-making power (he used the English expression): 'Dans la pratique des relations internationales . . . c'est la possibilité de se gouverner librement, de prendre soi-même des décisions, notamment en matière de relations et de tractations internationales, ou d'un mot, en matière de *treaty-making power*, qui caractérise ce qu'on appelle un État, et un État souverain' (ibid., p. 67). Another source of interesting differences is found in the comments and observations submitted by Governments with respect to the Draft Declaration on the rights and duties of states, collected in Doc. A/CN.4/2. The Indian Government proposed the addition to the Draft of a definition, and would have taken that contained in Oppenheim's *International Law*, but with regard to the element of 'sovereignty' thought it would be enough to say that a state should have, *in the main* (italics supplied), independence internally and externally (ibid., p. 170). Professor McGehan, in a paper on the subject written for the Government of New Zealand, thought that the word 'state' would seem to include a 'State as yet unrecognized by the community of Nations. "State" needs precise definition. Again, does "State" include semi-sovereign as well as sovereign States? It would be unwise to commit ourselves to support the right to exist of semi-sovereign States . . .' (ibid., p. 176). The United Kingdom openly indicated its view as being that the existence of a state should not be regarded as depending upon its recognition but on whether in fact it fulfils the conditions which create a duty of recognition (ibid., p. 186). This is similar to the doctrine enunciated in Art. 9 of the Charter of the Organization of American States, signed at Bogotá on 30 April 1948, quoted in the United States memorandum (ibid., p. 193): 'The political existence of the State is independent of recognition by other States.' As Professor Erich said in 1926: 'La naissance d'un nouvel État est toujours un fait historique qui ne dépend pas de certaines conditions juridiques. Les règles de droit ne sauraient régir l'évolution historique qui produit des transformations dans la vie des peuples' (see 'La Naissance et la Reconnaissance des États', in *Recueil des Cours*, 13 (1926), p. 427, at p. 442). For an interesting recent attempt by a Government to prove that it represents a sovereign and independent state, see the letter of 22 July 1949 from the Nepalese Director-General for Foreign Affairs to the Chairman of the Committee on the Admission of New Members, Doc. S/C.2/16 of 8 August 1949.

[3] The matter has arisen twice: at the 80th meeting of the Security Council on 15 November 1946, the application from Switzerland to become a party to the Statute of the Court was approved

Furthermore, when both of these two organs have severally adopted an affirmative Resolution, it is obvious that the statehood of the applicant is recognized for all purposes connected with the Organization and all of its organs. In the normal course of events that particular issue could not again be disputed. This is brought out more in the case of an affirmative Resolution by the General Assembly on an application for membership after an affirmative recommendation by the Security Council, because membership in the United Nations carries with it the right to accede to many of the specialized agencies and other international bodies and treaties created by or brought into relationship with the United Nations, and to which non-Members of the United Nations frequently have to be admitted in accordance with the various procedures established in the relevant treaties; but it is equally valid in the case of a vote on admission to the Statute of the Court, although this does not have the consequences of full membership. When there is an affirmative Resolution by only one of the organs, then, it is believed, the following consequences emerge: both the Security Council and the General Assembly would, in a sense, be estopped from denying the statehood of the country concerned if the matter should subsequently be raised before them. But whereas an affirmative decision of the Security Council alone would not bind the General Assembly on this point, whatever its persuasive value, it is considered that an affirmative Resolution by the General Assembly on the issue of statehood would be binding on every other organ of the United Nations. The reason for this is to be found not so much in the special position of the General Assembly in relation to the other organs of the United Nations, as in the application of the doctrine enunciated by the International Court of Justice in the Advisory Opinion concerning *Admission*, in its *dictum* cited above. In other words, the judgment of all the Members binds the whole Organization: that of any other single organ binds itself only.[1]

without debate, and this was followed, on 11 December 1946, by Resolution 91 (I) of the General Assembly. A more serious debate arose at the 432nd meeting of the Security Council on 27 July 1949, in connexion with the application of Liechtenstein to become a party to the Statute of the Court. Here doubts were expressed as to whether Liechtenstein is a state, and the Security Council's Resolution was adopted by nine votes in favour, none against, with two abstentions. The General Assembly approved the recommendation of the Security Council in Resolution 363 (IV) of 1 December 1949.

[1] Thus, the General Assembly's Resolution 113 (II) of 17 November 1947 establishes the statehood, for the purposes of the Organization, of Ireland, Portugal, Transjordan, Italy, Finland, and Austria. Resolution 197 (III) of 8 December 1948 adds Ceylon to this list. The issue of statehood is thus settled for all purposes of the Organization, but this does not lead to membership, as for this the affirmative vote of the Security Council is also required. This is not the only way in which this result is achieved: see, for example, Resolutions 121 (II) of 31 October 1947, 122 (II) of 1 November 1947, and 203 (III) of 18 November 1948, concerning the applications of Italy, Austria, and Finland for membership in the International Civil Aviation Organization and the interesting possibilities opened up by a provision such as that which appears in Art. XI of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Resolution 260 (III)): 'This Convention shall be open . . . for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.' As the Secretary-General pointed out in his Report on this article to the Fourth Session dated 17 August 1949, it rests with the General Assembly to designate the non-Member states which it wishes to invite to become parties to the Convention (see Doc. A/942). Clearly, action such as this would establish the existence of the statehood of the countries concerned. In the same way, Resolution 119 (VI) of the Economic and Social Council, adopted on 25 February 1948, recognizes the statehood of Burma and Ceylon for the purposes of that Council. Burma was itself subsequently admitted to the United Nations by Resolution 188 (S 2) adopted by the General Assembly in its Second Special Session on 19 April 1948. Another interesting form of limited recognition by E.C.O.S.O.C. is found in its Resolution 137 (VI) of 5 February 1948 on the application of Monaco for membership of U.N.E.S.C.O. This Resolution recommends to U.N.E.S.C.O. to consider the general problem of the admission of similar 'diminutive States'.

A somewhat different situation arises if action is being taken under Article 32 of the Charter. This is a procedural matter and it is doubtful if the objective factors establishing statehood are so strictly required here, or if the consequences of recognition are so far-reaching. This article provides:

> 'Any Member of the United Nations which is not a member of the Security Council, or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.'

If such an invitation is made by the Security Council it implies recognition of the invitee *as a state* by the Security Council, at all events *pro hac vice*, the conditions for such an invitation being that the body is a state, and that it is a party to a dispute (other, of course, than a dispute which comes within the domestic jurisdiction clause). The reality of the existence of a condition that there must be some form of statehood becomes clear after perusing the lengthy debates which took place in the 181st meeting of the Security Council on 12 August 1947, in which the problem of an invitation to the representatives of the Indonesian Republic was discussed, and that in the 330th meeting on 7 July 1948 on the question of the invitation addressed by the President to the representative of Israel. Under this article we have, indeed, a positive injunction laid upon the Security Council to invite states not Members of the United Nations to participate in the discussions. This requires that the Council take a positive stand on the matter. It is clear that when it does this the Council grants a form of recognition as a state to the body concerned. Admittedly, such recognition is strictly limited to the purposes set forth in Article 32. Nevertheless it may well be a fact of considerable political importance, considering the political repercussions which *ipso facto* attend the emergence of new states and the bringing of a dispute in which they are involved before the Security Council. This in turn may well impose a corresponding duty of restraint upon the Security Council not to issue such invitations until it is reasonably satisfied that the proposed invitee satisfies the conditions of statehood to an extent adequate to enable it to fulfil any special conditions which the Security Council has the right to lay down under the ultimate sentence of Article 32. In the final resort this means that the Security Council must be of opinion that the proposed invitee has the necessary capacity to carry out its duties in the matter.[1]

The Charter does not, in so many words, impose an analogous duty upon the General Assembly; its consistent practice has been not to invite non-Member states to participate in its plenary meetings, although it has on occasions invited them to participate, without, of course, the right to vote, in the discussions held in its Committees. This question has arisen in connexion with the participation in the discussions of the Political Committee of representatives of Korea,[2] of Transjordan and

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[1] Rule 39 of the Provisional Rules of Procedure of the Security Council (Doc.S/96/Rev.3) is important here. This is the rule which enables the Security Council to invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence. This rule is frequently used.

[2] See the discussions at the 87th–91st meetings of the First Committee (28–30 October 1947) after which the First Committee adopted a Resolution recommending that elected representatives of the Korean people be invited to take part in the consideration of the questions, and recommending the method of election: *Official Records of the Second Session of the General Assembly, First Committee*, pp. 248–81. This was not, properly speaking, a question of inviting a non-Member state, for at that time Korea was technically Japanese territory under Allied

Israel,[1] and of the Arab High Committee as representing an Arab Government of Palestine.[2] Such an invitation, which again may have considerable political effects, has a very limited legal result. It is believed that the position would be similar if a body not a Member of the United Nations but claiming to be a state, brought a matter to the attention of the Security Council under paragraph 2 of Article 35, or to the attention of the General Assembly under paragraph 2 of Article 11, which imports the procedure of paragraph 2 of Article 35. Here the Security Council or the General Assembly should satisfy itself that the body in question is objectively a state and is a party to a dispute, the real issue again being that of capacity in the sense described above. If the applicant declares that it accepts in advance for the purposes of the dispute the obligations of pacific settlement provided in the Charter, the Security Council can take the matter on its agenda. By so doing, it undoubtedly grants a measure of recognition to the applicant, and if subsequently the latter is invited to participate in the discussions of the Security Council under Article 32, the existence of this recognition becomes stronger. The application of this principle is seen in the handling of the dispute between Hyderabad and India, where the Security Council, in placing the matter on its agenda, expressly made it clear that it included in the matter the very question of the competence of Hyderabad to bring its dispute with India to the attention of the Council.[3] This issue has, so far as we are aware, not arisen before any other of the organs of the United Nations.

The situation is again different in respect of the position of the Secretary-General in relation to this problem. Under Article 7 of the Charter, the Secretariat is a principal organ. Under Article 97 the Secretary-General is the chief administrative officer of the Organization, and under Article 98 he shall perform such other functions as are entrusted to him by the other organs. Under Rule 6 of the Provisional Rules of Procedure of the Security Council[4] the Secretary-General shall immediately bring to the attention of all representatives on the Security Council 'all communications from states'. Similarly, under Rule 12 of the Rules of Procedure for the Assembly[5] the provisional agenda of a regular session, which the Secretary-General has to draw up, includes items proposed under Article 35, paragraph 2, of the Charter by states not Members of the United Nations. Does this imply a discretion on the part of the Secretary-General to weigh whether the originator of the communication to the Security Council is in fact a state or not? It may be doubted if this is so, and the practice of the Secretary-General certainly suggests a negative answer. Here the Secretary-General is performing functions which are essentially mechanical and routine, and which do not require or imply for

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occupation (see the remarks of Dr. Evatt at p. 252). The matter was discussed again during the Third Session in the 229th–230th meetings on 6 December 1948 (*Official Records of the Third Session of the General Assembly, Part I, First Committee*, pp. 936–56). This procedure led to complications which reappeared when the application of the Republic of Korea for membership was discussed at the 409th and 423rd meetings of the Security Council on 15 February and 8 April 1949, and also the application of the Democratic People's Republic of Korea, discussed at the 409th and 410th meetings, on 15 and 16 February 1949.

[1] At the 161st meeting of the First Committee on 15 October 1948, representatives of these two countries were allowed to take part in the discussions of the First Committee without the right to vote (*Official Records of the Third Session of the General Assembly, Part I, First Committee*, p. 160).

[2] See discussion at the 200th meeting (ibid., p. 634). Here the Committee was more hesitant, and approved the Chairman's suggestion that representatives of the Committee should be invited to express the views of the Arabs of Palestine on the future of Palestine. The discussion makes it clear that there was no intention to do anything which would convey the impression that the Committee was invited as representing any Government.

[3] See in particular the proceedings at the 359th meeting of the Security Council on 20 September 1948.

[4] Doc. S/96/Rev.3.

[5] Doc. A/520.

their proper performance any form of recognition. Even if the Secretary-General were to address a written reply to the body calling itself a state, or to its Foreign Minister, there could be no implied recognition on his part of the existence of the state. Even the adherents of the doctrine of implied recognition in its most extreme form could hardly claim recognition from the fact that a letter had been correctly addressed in accordance with the address and designation habitually used by its intended recipient.

But not all the functions of the Secretary-General are purely ministerial. For example, Resolution 23 (I) of 10 February 1946,[1] relating to the implementation of Article 102 of the Charter concerning the registration of treaties and international agreements, instructed the Secretary-General 'to receive from the Governments of non-member States, treaties and international agreements . . . for filing and publication', an instruction which was amplified in Resolution 97 (I) of 14 December 1946, and the regulations annexed thereto.[2] It is more than likely that this does place upon him the onus of deciding whether a document is a treaty or international agreement within the meaning of Article 102 of the Charter and the Resolutions, a duty which might further require a decision on his part whether one of the parties is a state, especially if the elegibility for registration is disputed.[3] On the other hand, it may be arguable that even here the Secretary-General's functions are of a mechanical nature, that he must accept treaties submitted to him, and that therefore he does not have to exercise his discretion about recognizing the state in question. Of an entirely different nature were his proposals for dealing with the problem of reparation for injuries incurred in the service of the United Nations.[4] Here the Secretary-General was of opinion that, as chief administrative officer of the Organization, he is the appropriate organ for the presentation and settlement of claims—claims which, as the Advisory Opinion on the subject indicates, are international claims. These views were accepted by the General Assembly, and this may well mean in practice that at a certain stage the Secretary-General will have to 'recognize' the defendant state, or else forgo the possibility of bringing an international claim.[5]

The question arises whether, one organ of the United Nations having granted recognition, that or another organ can withdraw it. This question must, it is believed, be answered in the affirmative to the extent that recognition by the United Nations is really a procedural question of the capacity of the applicant body, but not where it is a matter of substance. That is to say, where a limited form of recognition for limited purposes has been granted, the organ concerned is entitled to withdraw its recognition if circumstances should change, so that the organ concerned should reach the view that the formerly recognized state has lost its capacity to perform what is imposed upon it by the United Nations.[1] The position under particular United Nations law is, in this respect, probably clearer than it is under general international law.

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[1] *Resolutions adopted by the General Assembly during the First Part of its First Session*, p. 35. Also in *United Nations Treaty Series* (hereinafter referred to as *U.N.T.S.*), vol. I, p. xxx.

[2] *Resolutions adopted by the General Assembly during the Second Part of its First Session*, p. 189; *U.N.T.S.*, vol. I, p. xx. It is useful to compare these instructions with the Memorandum approved by the Council of the League of Nations on 19 May 1920, published in *League of Nations Treaty Series* (hereinafter referred to as *L.N.T.S.*), vol. I, at p. 7. The Secretary-General proposed to accept applications for the registration of treaties by non-Members of the League. For disputes as to the registrability of treaties under Art. 18 of the Covenant of the League of Nations, see *L.N.T.S.*, vol. 27, p. 449, and vol. 50, p. 282. A similar problem arises when the Secretary-General is requested by the Economic and Social Council to 'approach all Governments and enquire . . .'. See, for example, that body's Resolution of 7 March 1949, Doc. E/1237, concerning a survey of forced labour. In carrying out such an instruction the Secretary-General may have to decide whether a 'Government' represents a 'state' and thus to recognize the state in question.

[3] The so-called Linggadjati Agreement signed at Batavia on 25 March 1947 between Holland and the United States of Indonesia was not, apparently, submitted by either party to the Secretary-General for registration. Had it been submitted by the United States of Indonesia, which was not a Member, the Secretary-General would, it is suggested, have had to exercise his discretion. But once the Security Council had decided that the representatives of the State or Government of Indonesia should be invited to attend the meetings of the Council, it would be virtually impossible for the Secretary-General to refuse to accept a treaty submitted by those same representatives for filing and publication. For the text of the Linggadjati Agreement see *Dictionnaire diplomatique*, vol. 4, p. 624.

[4] Doc. A/955 of 23 August 1949.

[5] Resolution 365 (IV) of 1 December 1949.

The final question to be considered is the effect of recognition by the United Nations upon the position of the individual Member states. It is believed that a distinction has to be drawn between a substantive Resolution of the General Assembly, whether for admission to the Organization or to the Statute of the International Court of Justice, or on some other matter predicated upon the existence of statehood, and a resolution of any other organ, including a Committee of the General Assembly, which is a resolution on a question of capacity and thus procedural in character.[2] On an issue of substance, an affirmative vote by a member of the General Assembly must to-day be regarded as implying recognition. This view can be sustained by examination of the whole of the relevant treaty provisions in connexion with which the vote was taken—Article 4 together with Article 78 of the Charter in a matter of membership, Article 93 of the Charter and Article 34 of the Statute of the International Court of Justice in a matter of admission to the Statute, Article 93 of the Convention on International Civil Aviation signed at Chicago on 7 December 1944,[3] Article XI of the above-mentioned Convention on the Prevention and Punishment of Genocide, &c. It is emphasized that the whole of the relevant treaty provisions must be read, for 'it is a rule of interpretation which was well recognized and constantly applied by the Permanent Court of International Justice that a treaty provision should be read in its entirety'.[4] A negative vote on such an issue is harder to deal with. For example, an application for membership may be opposed on the ground that the applicant state is not peace-loving. Or it may be opposed on the ground that the applicant is not a state. Having regard to the terms of the Charter and to United Nations law in general, it is believed that negative votes will only carry with them an implication of non-recognition if this is clearly stated in explanation of the vote, or otherwise brought to the attention of the non-recognized state. Similar considerations apply in relation to Members who abstain, or are absent from the voting. Professor Lauterpacht recently wrote that as the concurrence of all the permanent members of the Security Council and of two-thirds of the General Assembly is required for the admission of a new Member, it would appear that a majority thus constituted ought to be treated as sufficient proof that the new state or government possesses the necessary qualifications entitling it to recognition.[5] Having

[1] This attitude is only possible on a legal view of recognition (cf. Lauterpacht, *Recognition in International Law* (1947), at p. 349). The statement there, that recognition is a declaration of capacity as determined by objective facts, is, as we have seen, undoubtedly true as regards recognition by the United Nations, and if a change in the objective facts affects the capacity, withdrawal of recognition is certainly justified.

[2] See the ruling of the President after the vote was taken on the invitation to be addressed to the representatives of the Indonesian Republic at the 181st meeting of the Security Council on 12 August 1947. The ruling was made after one of the permanent members of the Council had voted against the invitation, and it was not disputed. The same occurred at the 330th meeting of 7 July 1948 in connexion with the invitation which had been addressed by the President to Israel, a course of action which the Council upheld.

[3] *U.N.T.S.*, 15, p. 295.

[4] Joint Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold McNair, and Read in the *Admission, &c.*, Advisory Opinion (*I.C.J. Reports*, 1948, p. 57, at p. 84).

[5] Op. cit., at p. 403.

regard to the experience gained in the initial stages of the working of the United Nations, it may perhaps be possible to go farther and to urge that a majority of two-thirds of the General Assembly will always constitute this proof, and that it will imply recognition by all Members apart from those who specifically indicate their intention to the contrary.

As regards the procedural votes on capacity, the situation is not the same. At the most a capacity vote can do no more than grant something akin to *de facto* recognition by the organ to the state concerned—in so far as there exists to-day any distinction between recognition as a state *de jure* and recognition as a state *de facto*. More than that: while an affirmative vote may well normally mean implied *de facto* recognition at least (or, if the practice of the voting state does not distinguish between recognition *de facto* and recognition *de jure*, then implied recognition *simpliciter*) there is seen to be nothing incongruous in a state voting affirmatively while explaining that its affirmative vote is not to be taken as implying recognition. This conclusion is again reached from an examination of the provisions of the relevant articles of the Charter, an examination which, as we have suggested above, denotes that the word 'state' appearing there has more than one meaning. The position is the same as regards states which vote negatively or which abstain. In other words, while on a substantive issue an affirmative vote can never be coupled with a denial of recognition, this is possible on a procedural vote, having regard to the particular purposes for which those votes are taken.

Members of the United Nations who have, independently of the United Nations, recognized in any manner the state in question obviously cannot deny that statehood in any vote before any of the organs of the United Nations. There is here, so to speak, an estoppel. But this would not prevent them from casting a negative vote on an issue of substance if the voting state should honestly be of opinion that the conditions, other than that of statehood, imposed by the article under which the vote is being taken, are not fulfilled. For, applying and adapting the Advisory Opinion of the International Court in the *Admission* case, we can say that a Member of the United Nations which is called upon, in virtue of an article of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a state to membership of the United Nations, or for any other purpose predicated upon the existence of statehood, is not juridically entitled to make its consent to the matter under vote dependent on conditions not expressly provided by the said article. As a corollary, it is juridically under a duty only to cast its vote affirmatively if it is satisfied that all the conditions provided by the said article are fulfilled.

The following conclusions may be submitted:

(*a*) The United Nations has the capacity to, and does, recognize states. It may do so both as a matter of substance and as a matter of procedure.

(*b*) This capacity is exercised by the organ before which the matter arises, and reflects that organ's views as to the capacity of the applicant body.

(*c*) The nature or extent of the recognition varies in accordance with the article or articles of the Charter under which the decision has to be taken; similarly, the actual objective requirements to be possessed by the applicant body also vary.

(*d*) Recognition by one organ does not necessarily bind another organ, except in the case of a Resolution by the General Assembly which in its nature implies the existence of the state in question. Such Resolutions need not be confined to affirmative Resolutions on membership of the Organization or of the Statute of the International Court of Justice.

(*e*) No recognition is presumed when the Secretary-General performs mechanical and routine functions concerning which no real discretion is left him. Where he is under a duty, express or implied, to exercise a discretion, he may, as a principal organ of the United Nations, recognize a state.

(*f*) An organ of the United Nations which has, otherwise than on a substantive issue, granted recognition to a state, can subsequently withdraw its recognition if circumstances should change.

(*g*) An affirmative Resolution of the General Assembly upon an issue itself predicated upon the existence of statehood implies recognition of that state by all Members except those who, not voting for the Resolution, give clear indication of their denial of recognition. An affirmative procedural Resolution of any organ will imply recognition by all states members of that organ, unless they give clear indication that this is not to be implied. Even states voting for the Resolution may give such indication.

(*h*) States which have independently recognized the state concerned, are prevented from denying, for any purpose, such statehood before any organ of the United Nations.

S. Rosenne

THE *CORFU CHANNEL* CASE: MERITS

The Judgment of the International Court of Justice in the *Corfu Channel* case is, perhaps more than any other previously given by the Court or its predecessor, conspicuous for the number of legal issues which it decides or on which it is based. The object of this Note is to survey these issues. No attempt will be made here to examine them in detail. However, it will be convenient to preface this Note by a brief statement of the facts which gave rise to the Judgment.

The Judgment was delivered on 9 April 1949. By a curious coincidence, this was exactly two years after the Security Council had passed its recommendation that the dispute should be referred by the parties to the Court. The proceedings were commenced by an application filed by the Government of the United Kingdom on 13 May 1947, but, as the Albanian Government raised a preliminary objection to the jurisdiction, which the Court rejected in its judgment of 25 March 1948 (see this *Year Book*, 25 (1948), p. 409), written pleadings on the merits were not concluded until 20 September 1948. The hearing of oral argument and testimony began at The Hague on 9 November 1948, and continued for several weeks until 17 December. Further arguments were heard from 17 to 22 January 1949, when the Court adjourned to consider its judgment.

On 22 October 1946 a squadron of British warships left the port of Corfu, and proceeded northward through a ‘swept Channel’ in the North Corfu Strait. The channel had been swept in October 1944, and the existence of a safe route was announced by the Allied Command in November 1944. In January and February 1945 it was check-swept by the Royal Navy with negative results. On 15 May 1946, two British cruisers passed through the channel without encountering mines (though they were fired upon by Albanian shore-batteries). The ships passing through this channel on 22 October 1946 were the cruisers *Mauritius* and *Leander*, and the destroyers *Saumarez* and *Volage*. *Mauritius* was leading, followed by *Saumarez*; at a certain distance astern came the cruiser *Leander* followed by *Volage*. Outside the Bay of Saranda *Saumarez* struck a mine and was heavily damaged. *Volage* was ordered to give her assistance and take her in tow. Whilst towing the damaged ship *Volage* herself struck a mine and was much damaged. In spite of the fact that her bows were blown off, she succeeded, under the magnificent seamanship of her commander, in making Corfu with the other vessel in tow. As a result of this incident forty-four officers and men lost their lives, forty-two were injured, *Saumarez* became a total loss, and *Volage* sustained severe damage and was out of commission for many months.

The channel through which the British ships were passing had been publicly notified as safe for navigation by an organization known as the International Routeing and Reporting Authority, whose function it was to co-ordinate the information on swept channels and minefields passed to it by the International Mine Clearance Board. These bodies included representatives of the principal maritime Powers, and were set up after the war in order to organize and carry out the clearance of mines. In view of the fact that the channel had been regarded as safe for navigation, the Government of the United Kingdom decided that steps should be taken to ascertain the cause of the explosions of 22 October 1946. By a note dated 10 November 1946, it informed the Albanian Government of its intention to sweep the channel on 12 November, and defined the area to be swept. The Albanian Government protested against this decision both to the Government of the United Kingdom and to the Secretary-General of the United Nations, on the ground that the penetration of foreign warships into Albanian territorial waters without the consent of Albania was a violation of Albanian sovereignty. Nevertheless, on 12–13 November 1946, British mine-sweepers reswept the channel under the direction of the Allied Commander-in-Chief Mediterranean. A French officer, being the representative of the Mediterranean Zone (Mine Clearance) Board, was invited to attend as an observer, and did so. During the sweeping operation twenty-two contact mines were detected and cut, and were discovered in such a position as to leave no room for reasonable doubt that they had been deliberately laid as a minefield, and were not isolated floating mines. From the condition and appearance of the mines experts decided that they had been recently laid.

In the light of these facts (which the Court found to be established) the United Kingdom at first sought to obtain satisfaction from Albania, but, failing to do so, subsequently brought the matter before the Security Council. That body, during February, March, and April 1947, held several meetings, and finally voted a resolution recommending that the two Governments should immediately refer the dispute to the International Court. As already stated above, the Government of the United Kingdom commenced proceedings by an Application dated 13 May 1947, but after the Judgment of the Court dismissing the preliminary objection of the Albanian Government to the jurisdiction, the two Governments announced that they had signed a special agreement defining the issues to be submitted to the Court. These were two in number:

> '1. Is Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?
>
> '2. Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?'

As the facts, on the basis of which these questions of law fell to be answered, were disputed by the Albanian Government in almost every particular, it became necessary to hear evidence regarding the passage on 22 October 1946 and the sweeping on 12 and 13 November, the establishment of a swept channel in 1944 and 1945, the nature of the mines discovered, and similar matters. In addition, expert witnesses for both parties gave evidence at the hearings, produced sketches, maps, &c., on the subject of laying mines, the possibility of the operation of mine-laying being heard from the coast, the state of Albanian coastal defences and look-outs, &c.

The United Kingdom at first maintained in its written pleadings that the Albanian

Government laid the mines, but during the hearings no attempt was made to substantiate this, and the alternative allegation was relied on, i.e. that the mines were laid with the connivance or knowledge of Albania, and that the Albanian Government failed, 'contrary to the general principles of international law and humanity', to notify the existence of such mines. Moreover, the Government of the United Kingdom maintained that it was an aggravation of the wrong that it constituted an interference of the right of innocent passage through international straits possessed by warships. Evidence was given by a former Yugoslav officer Kovacic, tending to show that the mines were laid by Yugoslav mine-sweepers.

As regards the second question of the *compromis* Albania maintained that a coastal state is entitled, in exceptional circumstances, to regulate the passage of foreign warships through its territorial waters, that the disturbed conditions existing in that part of the world in the autumn of 1946 justified the Albanian Government in requiring that foreign warships should obtain its authorization before passing through its territorial waters, and, as such authorization had not been obtained, either in respect of the passage in October or in respect of the sweepings in November, on both occasions there had been a violation of Albanian sovereignty.

The Court was confronted not only with these difficult questions of law, but also with the unusual task of evaluating evidence—a task most exceptional for international tribunals, which are normally confronted with agreed facts and merely asked to pronounce upon the legal position. It held, on the evidence produced, that a channel which had been swept of mines was established in the Corfu Strait, and, in this channel, a minefield was found on 13 November 1946; that the two ships had been struck by mines belonging to this minefield; and that the minefield was laid at some time before 22 October 1946. The damage sustained by the ships (the Court found) was of such a nature as to be inconsistent with that which could have been caused by mines of a different type from those discovered on 13 November.

The Court did not consider that there was sufficient evidence to show by whom the mines were laid, but on the basis of expert evidence given before the Court, and further evidence obtained by a Committee of independent experts (appointed by the Court) which visited Albania in January 1949, it decided that a number of facts led to the inference that the Albanian Government must have known of their existence, and by possessing such knowledge and failing to notify shipping, it incurred international responsibility. It said:

> 'The obligations incumbent upon the Albanian authorities consisted in notifying for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters, and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on Hague Convention No. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely: elementary considerations of humanity even more exacting in peace than war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.'

The Court, therefore, reached the conclusion that the Albanian Government was responsible under international law for the explosions of 22 October 1946, and the resulting damage and loss of life. The Albanian Government, before the close of its oral argument, maintained that as the special agreement (*compromis*) did not specifically empower the Court to assess compensation it had no jurisdiction to do so. The Court dismissed this contention and made an Order fixing time-limits for the Observations of the parties on the amount to be awarded.

On the second question submitted by the *compromis* the Court held that the Royal

Navy did not violate Albanian sovereignty on 22 October 1946, because, on that day, it was exercising the right of innocent passage which, the Court declared, existed in international straits. (Further comment on this important decision is made below.) As regards the sweeping of 12–13 November it did not consider that the same justification applied, and it declared that this action was a violation of Albanian sovereignty. It added, however, that this declaration was 'in itself appropriate satisfaction'. Two arguments were submitted by United Kingdom counsel to justify the legality of the action of sweeping—the right of intervention and self-help. The Court rejected these arguments saying

> 'between independent states respect for territorial sovereignty is an essential foundation of international relations. The Court recognises that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.'

What principles of international law may be extracted from the Judgment of the Court? The field covered by it is very wide, and this may account for the fact that few authorities are cited in the Judgment, which is succinct in its statement of principles. If the Court had embarked on an examination of the authorities on each of the points raised, the Judgment would have been of considerable length. The following is a summary of the learning to be collected from it.

1. *Evidence in international law*

(*a*) *Where a charge is brought against a sovereign state of exceptional gravity, conclusive evidence establishing a high degree of certainty is required* (p. 17). This rule emerges from the Court's discussion of the evidence given by Kovacic, showing that mine-layers observed by him in Yugoslavia departed and returned a few days after the occurrence of the incident of 22 October, and the contention of the United Kingdom that these Yugoslav mine-layers laid the mines in the Corfu Strait. The Court (at p. 17) said that 'even in so far as these facts are established, they lead to no firm conclusion', i.e. the mine-layers might have gone somewhere else. The Court held that there was no proof that Yugoslavia possessed any GY mines (the type of mine discovered on 12–13 November), and the history of the ships after they left the port of Sibenik until their return was not proved, since Kovacic's evidence on where the mine-layers had been was hearsay. Consequently the facts observed and related by Kovacic could not be said to point only in one direction. Furthermore, the existence of close relations between the two countries in the autumn of 1946 (though they had deteriorated by the time the case was heard) was not sufficient to show that they were guilty of collusion in the matter of mine-laying.

(*b*) In the following passage (at p. 18) the Court applied something rather similar to the doctrine of *res ipsa loquitur* in English law:

> 'It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were the victims. It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that the State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of

information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.

'On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.'

(*c*) The general rule as regards circumstantial evidence is that it must leave no room for reasonable doubt (p. 18).

(*d*) *Disclosure of Documents* (p. 32).

'In accordance with Article 49 of the Statute of the Court and Article 54 of its Rules, the Court requested the United Kingdom Agent to produce the documents referred to as XCU for the use of the Court. Those documents were not produced, the Agent pleading naval secrecy; and the United Kingdom witnesses declined to answer questions relating to them. It is not therefore possible to know the real content of these naval orders. The Court cannot, however, draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise. The United Kingdom Agent stated that the instructions in these Orders related solely to the contingency of shots being fired from the coast—which did not happen. It is true, as the commander of Volage said in evidence, that the orders contained information concerning certain positions from which the British warships might have been fired at, it cannot be deduced therefore that the vessels had received orders to reconnoitre Albanian coastal defences. Lastly, as the Court has to judge of the innocent nature of the passage, it cannot remain indifferent to the fact that though two warships struck mines, there was no reaction, either on their part or on that of the cruisers that accompanied them.'

Article 49 of the Statute enables the Court to take 'formal note' of a refusal to produce documents; this provision owes its historical origin to an almost identical one in Article 69 of the Hague Convention of 1907 regarding the Pacific Settlement of Disputes. There are precedents for non-disclosure in special circumstances, e.g. the refusal of the United Kingdom on 6 September 1899 to produce a confidential document during the British Guiana–Venezuelan Boundary Dispute.

(*e*) *Responsibility of states.* Two principles may be extracted from the Judgment under this heading:

(i) The state on whose territory an international wrong has occurred or, to use the words of the Judgment, 'an act contrary to international law', may be called upon to give an explanation and should 'up to a certain point' show what steps it has taken to investigate the matter (p. 18). This principle is stated more explicitly at p. 56 in the Dissenting Opinion of Judge Winiarski. This principle will be relevant in future when wrongs are suffered by nationals abroad and the state on whose territory the acts take place confines itself to a bare denial. It is not a novel principle, but this duty to investigate and make inquiries now has the high authority of the International Court. No doubt the proposition could be formulated 'in whose territory what prima facie appears to be an act contrary to international law has occurred'.

(ii) A state may be responsible for a mere omission if as a result of that omission damage is sustained by another state in the course of lawful activity by the latter state. This is particularly applicable where a state has the last opportunity of avoiding the damage by reason of knowledge in its possession, and fails to notify the other state. The above principle emerges from pp. 22–3 of the Judgment. The application of it to particular facts in the future is impossible to foresee. The most that can be said is that the Court at this point refused to be limited by the technicality that the provisions of the Hague Convention were not strictly applicable, and took that Convention as merely an illustration of general principles of international law which it enumerates at p. 22, namely, 'elementary considerations of humanity even more exacting in peace than in war; the principle of freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states'. In other words, international law is not negative and does not say that, because a state has not specifically assumed a particular duty, it is not subject to such duty. There is 'a good neighbour' obligation underlying international law which may be expressed in the principle *sic utere tuo ut alienum non laedas*.

(*f*) *Damages*. The Court laid down two principles of law under this head:

(i) Where a special agreement empowers the Court to decide whether compensation is due in respect of the breach of international law, this also empowers the Court to assess the amount of such compensation (p. 24). The Permanent Court had already decided in the *Chorzów Factory* case that, where it had jurisdiction to decide whether there was a breach of international law, it had also jurisdiction to decide whether reparation was due. If there was any doubt as to whether the Court was empowered to take the further step of assessing the compensation, the present Judgment removes that doubt. Where the case goes to the Court under the Optional Clause it automatically has jurisdiction to assess compensation under Article 36 of the Statute.

(ii) *Mitigation of Damages*. It seems, though the Court does not expressly say so, that it accepts the doctrine that extenuating circumstances may mitigate the amount of damages due in respect of a breach of international law (p. 35), although in fact all it expressly decides is that a declaration by the Court that there has been such a breach, in so far as concerned 'Operation Retail' (the sweeping), was in itself appropriate satisfaction (adopting in this respect the request made by Albanian counsel). However, there is in fact existing authority (see Whiteman, *Damages in International Law*, vol. i, p. 207) for saying that damages may be reduced by extenuating circumstances.

(*g*) *Law of the Sea. Straits*. Under this head the Court accepts the following principles:

(i) 'It is, in the opinion of the Court, generally recognised and in accordance with international custom that states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal state, provided that the passage is innocent. Unless otherwise prescribed in an international Convention, there is no right for a coastal state to prohibit such passage through straits in time of peace.' The most recent book on international straits, by Bruel, published in 1947, in vol. i, p. 202, states that before the late war warships were 'supposed to have the same right—although not with the same degree of certainty' as merchant vessels in this respect, and that the Hague Codification Conference of 1930 seemed to have created greater certainty on the point, though the position of territorial waters was still unsettled.

(ii) The decisive test of an international strait is its geographical situation as connecting two parts of the high seas, and the fact of its being used for international navigation (p. 28). The definition of an international strait was one of the great difficulties in the presentation of the United Kingdom argument before the Court. A weighty body of opinion confined the definition of an international strait to a strait which was of substantial importance to shipping or international commerce, or which was a necessary and indispensable route and not merely an alternative one. Considerable divergency existed between writers as to the terminology used, but Bruel, vol. i, pp. 42–3, definitely accepted the view that the geographical definition was not sufficient. The Court has, however, taken a decision on this point which conforms with practical requirements, because if the definitions of the writers were accepted, it would be impossible to say in advance, with any degree of certainty, whether a strait was an international one or not, as it would be a matter of opinion whether its importance to international shipping, &c., was sufficiently 'substantial', and, if the definition were confined to straits which were a necessary route for international navigation, such straits would be very few indeed and would, in practice, be mostly regulated by treaty already. The limitation which the Court makes is that the fact must be shown that it is being used for international navigation. The use of the Corfu Channel which was found sufficient for this purpose is set out on p. 28 of the Judgment.

(iii) A passage does not cease to be innocent for the purposes of this rule merely because its purpose is to assert a right which has been unjustly denied (p. 30). On this principle the Court almost unanimously (14–2) found innocent a passage by a squadron of two cruisers and two destroyers with the crews at action stations and the guns fore and aft. In considering the innocence of a passage it is necessary to have regard to the manner in which it is carried out. The fact, however, that the movement of armed vessels (in itself innocuous and not hostile, or aggressive) is misconstrued by personnel on the coast, does not deprive a passage of its innocent character (p. 31). It depends on the circumstances of a case whether measures of precaution in order to assert a right by way of passage are, or are not, unreasonable; and it may be that, in the circumstances, a demonstration of force intended to insure against hostile action from the coast would be reasonable, and it was so held in the present case (p. 31). 'The intention must have been, not only to test Albania's attitude but at the same time to demonstrate such force that she would abstain from firing again on passing ships.'

(*h*) *The right of intervention and self-help*. The International Court has definitely condemned the alleged right of intervention, and declares that it does not find a place in modern international law. Similarly it holds that *self-help* (which, however, although the Court does not expressly do so, we must distinguish from *self-defence*) is now no longer allowed (p. 35). The Court did not accept the United Kingdom argument that something in the nature of self-help or intervention must be permissible in international law given the lacunae in international organisation. It showed no sympathy with the plea that it is necessary, given the absence of an international police force, to allow a state to enter into the territory of another state in exceptional circumstances where there is a danger of evidence being lost or suppressed, and where urgent action is necessary in order to obtain or safeguard that evidence in order to bring a complaint before an international body or court.

The relevant sections in text-books dealing with intervention and self-help will require careful rewriting in the light of the Court's Judgment.

(*i*) *Interpretation of Treaties. Interpretation of the Special Agreement*. This aspect of the Judgment is commented upon in another part of this volume (see above, pp. 54 and 66).

J. Mervyn Jones

THE BRITISH COMMONWEALTH AND STATE SUCCESSION AFTER THE SECOND WORLD WAR

Since the Second World War the British Commonwealth has offered several examples of accession to statehood and of consequent problems of state succession. India and Pakistan have been formed out of the international person known as British India. After a short existence as a Dominion owing allegiance to the King the former has become a Republic, while the latter retains its former Dominion status. Ceylon has been erected into a Dominion. Newfoundland, formerly a Dominion, has been absorbed into Canada with the status of a constituent province. Transjordan and Israel have become independent states out of territories comprised in the Mandates of Palestine and Transjordan. Burma has achieved independence within the territory previously administered under the India Office. It is proposed in this Note to survey the arrangements entered into for a distribution among these several successor states of the various rights and liabilities which rested with their predecessors. No attempt will be made to examine critically the issues involved. It will be convenient to deal with the subject under the following heads: (1) Treaties; (2) Contracts; (3) Officials; (4) Public Debt; (5) Pensions; (6) Public Property; (7) Law and the Judicial System; (8) Nationality.

1. *Treaties*. British India had, since the Treaty of Versailles, gradually attained international personality.[1] When India and Pakistan were formed out of it the question arose whether that personality had continued to exist in one or other of the new Dominions, or had been extinguished altogether. The issue became pertinent on 11 August 1947, when Pakistan claimed automatic membership of the United Nations. If the personality of British India had been sustained in the new India Pakistan would have been in the position of a seceding state, and India alone would have retained membership of international organizations. On the other hand, if British India had been dismembered so that neither continued its juristic personality, then, it would seem, neither should have inherited its membership. The view contended for by Pakistan was that both the Dominions were successors in membership. India's view, on the other hand, as expressed by Pandit Nehru, was that 'both from a practical and legal point of view, India as an entity continued to exist, except that certain provinces and parts of certain provinces now sought to secede', that 'seceding areas were free to have any relations which they liked with foreign Powers', and 'the Government of India was intact and there should be no further confusion of Hindustan and Pakistan'.[2]

The Secretariat of the United Nations, in dealing with Pakistan's claim, found itself in the position of having to make an administrative decision with far-reaching legal implications. After conferring with the British Government it delivered the following opinion:

> 'From the viewpoint of International Law, the situation is one in which part of an existing State breaks off and becomes a new State. On this analysis there is no change in the international status of India; it continues as a State with all treaty rights and obligations, and consequently with all rights and obligations of membership in the United Nations. The territory which breaks off—Pakistan—will be a new State. It will not have the treaty rights and obligations of the old State and will not of course have membership in the United Nations. In International Law the situation is analogous to the separation of the Irish Free State from Britain, and of Belgium from the Netherlands. In these cases

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[1] Sen in *The Indian Law Review*, 1 (1947), p. 192; Mervyn Jones in this *Year Book*, 24 (1947), p. 370.

[2] *The Statesman*, 17 July 1947; Sen, loc. cit., p. 193.

the portion which separated was considered a new State, and the remaining portion continued as an existing State with all the rights and duties which it had before.'[1]

Upon the assumption that this was the legal position, the Indian Independence (International Arrangements) Order, 1947,[2] was thereupon gazetted, which among other things provided that India was to be the only one of the two Dominions to remain a member of international organizations.[3] This interpretation of the situation, however, did not remain unchallenged. When the Secretariat had given its opinion, and Pakistan, acting upon it, applied in the ordinary way for membership of the United Nations, objection was raised in both the Security Council and the First Committee of the General Assembly to the assumption that India was still the same person as British India.[4] In the Security Council France adopted Pakistan's original argument and maintained that the latter had inherited along with India the original membership of British India[5] and that therefore no application for membership was necessary. In the First Committee Argentina voiced the opinions of a number of delegations in contending that the division had effected the extinction of British India, and that therefore neither of the new Dominions should be considered a successor in membership.[6]

As a result, the legal committee was requested to advise on the course to be followed in similar circumstances. Its opinion was that a state does not cease to be a Member merely because its frontier and constitution have been subjected to changes. This effect, it held, can only be brought about by proof that the international personality of the state had been extinguished. It was also of opinion that when a new state is formed it cannot claim to be automatically a Member of the United Nations, and must make application for admission.[7]

The opinion of the Secretariat has also been criticized as drawing an improper analogy from the cases of the Irish Free State and Belgium.[8] In those cases the old sovereigns actively participated in the act which created the new states. The creation of Pakistan, on the other hand, was not the act of India; nor did India directly participate in it. It was a division enacted by a constitutional superior, and in no sense of the word, it has been asserted, could it be considered that there was any secession on the part of Pakistan. Both the Dominions were in the position of new states.[9] Whatever the merits of this view, the course recommended by the Secretariat was followed as a practical expedient. India was regarded as continuing to be a Member, while Pakistan's application for membership was treated in the normal way.[10]

There were two classes of treaties to which British India had been subject before the partition: those after 1919 signed 'for India', and those concluded before and after that date solely in the name of the Crown and Government of the United Kingdom, but which extended in operation to India.[11] The view of the British Government was that no distinction was to be drawn between these 'personal' and 'imperial' treaties. The Dominion of India, it was considered, would succeed to the bulk of them, while Pakistan would inherit no treaty obligations other than that indefinite class that 'run with the land'. Both India and Pakistan, however, were willing to continue all treaty rights and obligations of British India. In the Indian Independence (International Arrangements) Order provision was made for the apportionment of such rights and obligations between them. Those having an exclusive territorial application to an area comprised in the Dominion of India were to devolve on it alone,[1] while Pakistan was to inherit those having a similar application to its territory.[2] Treaties not having such an exclusively territorial application were to devolve 'both upon the Dominion of India and upon the Dominion of Pakistan', and would, if necessary, be apportioned between them.[3] The effect of this latter provision was to make each of the Dominions a party to those treaties which had not a localized operation and the obligations of which could be severally discharged. The Indo-United Kingdom Trade Agreement, 1939, for example, is regarded as in operation between Great Britain and Pakistan, while the Secretariat of the United Nations accepted Pakistan's declaration that it was a party to the Conventions relating to Obscene Publications and the Traffic in Women and Children, to which British India had been a party, and did not object to its signing protocols which were only open to parties to these Conventions.[4]

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[1] *United Nations Press Release*, P.M. 473, 12 August 1947; *New York Times*, 12 August 1947.

[2] *Gazette of India Extraordinary*, 14 August 1947; Annex to U.N. Doc., A/C.6/161, 6 October 1947, p. 3.

[3] Schedule, s. 2 (1).

[4] See Schechter in this *Year Book*, 25 (1948), p. 103.

[5] U.N. Doc., S/496, 18 August 1947.

[6] Ibid., A/C.6/156, 2 October 1947.

[7] Ibid., A/C.1/212, 11 October 1947.

[8] Sen., loc. cit., pp. 196 ff.

[9] Ibid., p. 198.

[10] U.N. Doc. S/498, 16 August 1947.

[11] See Mervyn Jones, loc. cit., p. 370.

The extent of the operation of this Order has been questioned. In so far as it refers to law-making or dispositive treaties which would normally devolve on the successor states, the Order is merely declaratory of the legal position. With regard to treaties which would not normally devolve it creates an exception to the law. It has been doubted whether the Order would be given effect to in the case of treaties which are essentially political, 'since both precedent and practice are contrary to recognizing succession in these matters'.[5] It has been assumed that the Order was intended to prevent India from being liable in respect of territory over which it had lost control.[6] Usually, however, this is left to the operation of law and the interpretation of individual treaties. The main purpose of the Order was to ensure that there would be no interruption in Pakistan's economic relations with other countries.

Similar motives inspired like provisions in the cases of Transjordan and Burma. Obligations of the British Crown under any 'international instrument' which applied to Transjordan and which was not 'legally terminated' were to devolve on the Amir of Transjordan alone, who was to observe the terms of any 'international treaty, convention or agreement' which had been made applicable to the territory, until such time as he became a separate contracting party himself, or until the instrument in question should be legally terminated.[7]

In the case of Burma it was agreed that all obligations of the United Kingdom which arose from an international instrument which might be held to have application to Burma, and also rights and privileges enjoyed under it, should henceforth devolve on the Provisional Government of that country.[8]

It is not certain whether the elevation of a territory to Dominion status has any effect on treaties which previously applied to it. Ceylon followed the precedents[9] established by the other Dominions and regarded itself as a party to treaties of the United Kingdom contracted for it or extended to it. When the Australian colonies were absorbed in the Commonwealth of Australia, the British Government took the view that treaties made on behalf of the individual colonies had not been abrogated, but now were henceforth binding upon the Federal Government. The King, it was considered, is the contracting party for each unit in the Empire, and the federation was merely a constitutional adjustment under the same sovereign. The accepted theory until recently was that when a territory assumed Dominion status the King, as sovereign, remained bound by treaties referring to it.[1] In the case of Ceylon, where certain powers with respect to foreign relations are still reserved to the King acting on the advice of his Privy Council, this theory may still be correct. To what extent, however, the changing notions on the divisibility of the Crown demand a modification of the theory is not clear.[2]

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[1] S. 3 (1) of the Schedule.

[2] S. 3 (2).

[3] S. 4.

[4] Schechter, loc. cit., p. 106.

[5] Ibid.

[6] Ibid., p. 372.

[7] *British Treaty Series*, Cmd. 6916 (1946): Treaty of Alliance between the United Kingdom and Transjordan of 22 March 1946, Art. 8.

[8] Ibid., Cmd. 7360 (1948): Treaty between the Government of the United Kingdom and the Provisional Government of Burma regarding the Recognition of Burmese Independence and Related Matters, Art. 2.

[9] See Mervyn Jones, loc. cit., p. 372; McNair, *The Law of Treaties* (1938), p. 135.

2. *Contracts.* In only two of the instruments relating to the creation of the new international persons is there reference to the maintenance of contracts as such. The Indian Independence (Rights, Property and Liabilities) Order, 1947,[3] provides that contracts of British India which were for purposes exclusively relating to territory incorporated in Pakistan should be deemed to have been made on behalf of that Dominion.[4] Pakistan was to be invested with all rights and liabilities which had accrued or should accrue in the future under any such contract,[5] and there was to be included in such liabilities the obligation to satisfy an order or award made by any court or other tribunal[6] in proceedings relating to the contract, and expenses incurred in connexion therewith. All other contracts were deemed to have been made on behalf of India.[7] Similar arrangements were made with respect to contracts of the partitioned provinces of Bengal and Punjab.[8]

In the Treaty of Alliance between Transjordan and the United Kingdom it was agreed that 'commercial concessions granted in respect to Transjordan territory prior to the signature of this treaty shall continue to be valid for the periods specified in the texts'.[9] Great Britain had already in the Treaty of Lausanne assumed responsibility for the maintenance of such concessions, and Transjordan was prepared to take over this responsibility. It is not certain what other kinds of contracts subsisted at the time of the change of sovereignty, and it is probable that the few, if any, which related specifically to Transjordan territory, and were not 'international instruments' within the meaning of Article 8 of the Treaty, were left to be determined as the question arose.

3. *Officials.* British civil service officials hold office at the pleasure of the Crown,[10] and it is not to be assumed that those of them employed in the new states would enjoy any greater measure of security after the succession than before it. This is particularly so in India and Burma, where officials of alien race, customs, and ideas would necessarily have to be replaced, to some extent at least, by native administrators.

It was announced by the Viceroy[11] that the 'Government of India agrees that compensation should be payable to those who are not invited to continue to serve under the Government in India after the transfer of power'. A scale of compensation was evolved, but that this was a matter of grace only would appear from the statement of the Prime Minister in the House of Commons[12] that promises of compensation in the event of termination of service had been made to encourage recruiting after the war. Many officials, however, were taken over by the Governments of India and Pakistan, and the Indian Independence Act, 1947,[13] included a provision that every person appointed to the Indian civil service or judiciary who continued to serve in office after the establishment of the Dominions should be entitled to receive from the successor Governments the same conditions of service as respects remuneration, leave, and pension, and the same rights as respects disciplinary matters and tenure of office as he was entitled to previously.[1]

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[1] See Keith, *Responsible Government in the Dominions* (2nd ed., 1927), vol. ii, p. 735; the same, *The King and the Imperial Crown* (1936), p. 439.

[2] Keith, *Constitutional Law* (7th ed., 1939), p. 538.

[3] *Gazette of India Extraordinary*, 14 August 1947.

[4] S. 8 (1) (*a*).

[5] S. 8 (1).

[6] S. 8 (5) (*a*) and (*b*).

[7] S. 8 (1) (*b*).

[8] S. 8 (2) and (3).

[9] Art. 10.

[10] Keith, *Constitutional Law* (7th ed., 1939), p. 196; *Leaman* v. *R.*, [1920] 3 K.B. 663.

[11] Cmd. 7116 (1947).

[12] Ibid.

[13] 10 & 11 Geo. VI, c. 30.

In the case of Burma it was announced[2] that few opportunities for continued service would be offered to European officers, but that those whose service was discontinued would be compensated. The Prime Minister stated in the House of Commons that the source of the moneys from which the compensation would be derived had not been agreed upon.[3] The Governor of Burma notified[4] officials there that 'the Government of Burma take the view that all Secretary of State's officers, Burman and British alike, should have their present service terminated on the transfer of power under the conditions laid down in the rules governing ordinary or premature retirement as may be appropriate'. He added: 'Those who wish to continue in service under the Government of Burma and are acceptable to that Government will enter on new contracts settled between the Government of Burma and the officers themselves.'

With respect to Ceylon it was laid down[5] that officials 'may . . . retire from the public service, and on retirement be granted a pension or gratuity in accordance with and subject to the provisions of' Article 88 of the Ceylon (State Council) Order in Council, 1931. The compulsory retirement of certain officers was also provided for.[6]

When British jurisdiction ceased in Palestine, it was arranged[7] that for the purposes of the Superannuation Acts 'any person holding office in the service of the Government of Palestine immediately before the appointed day shall be deemed to continue in his office until either he is appointed to the service of the Crown elsewhere, or, if he is not so appointed, he retires or is removed from office'. In effect most of the officials were given alternative employment in Malaya and elsewhere.

4. *Public debt*. There was no direct repartition of the debt of British India between the two Dominions. All financial obligations, including loans and guarantees, of the central Government of British India remained the responsibility of India.[8] The financial obligations of the partitioned provinces of Bengal and the Punjab, however, became the liabilities of those halves of the provinces which were incorporated in Pakistan.[9] The obligations of the other provinces remained with them.[10] While India continued to be the sole debtor of the central debt,[11] Pakistan's share of this debt, proportionate to the assets which it received, became a debt to India. In this manner the difficulties attending the substitution of debtors over arbitrary portions of the public debt were avoided.[12] Deposits in a Post Office Savings Bank situate in the Dominion of Pakistan at the time of the partition and which had not been subsequently removed, and those which had been transferred from India to Pakistan, were to cease to be the liability of

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[1] S. 10.

[2] Cmd. 7189 (1946).

[3] Ibid.

[4] Ibid.

[5] The Ceylon (Constitution) Order in Council, 1946, s. 63, *S.R. & O.* 1946, Appendix of Prerogative Orders, No. 2.

[6] Ibid., s. 84.

[7] The Termination of Jurisdiction in Palestine (Transitional Arrangements) Order in Council, 1948, s. 7, *S.R. & O.* 1948, No. 1603.

[8] Indian Independence (Rights, Property and Liabilities) Order, 1947, loc. cit., s. 9 (*a*).

[9] S. 9 (*b*) and (*c*).

[10] S. 9 (*d*).

[11] *Constituent Assembly of India (Legislative) Debates*, 19 March 1948, vol iv, No. 1, Official Report. The Hon. Shri R. K. Shanmukham Chetty stated that the entire outstanding public debt of the late Central Government, amounting to Rs. 18,03,97 lakhs, had been assumed by the Indian Government, while Pakistan's 'share' would be included in its debt to India.

[12] *Indian Finance, Special Partition Supplement*, 28 June 1947, vol. xxxix, No. 28, pp. 1254–6.

India and become that of Pakistan.[1] Items of excess profits tax deposits and interest, civil service bonuses, railway company deposits, deferred pay of military personnel, and postal life insurance policies were to follow the assets to which they related or the domicil of the persons to whom they were payable, as the case might be.[2] Outstanding money orders were to be the responsibility of Pakistan if the post office which received the original credit was situated in its territory.[3]

The financial arrangements made with Burma represent an attempt on the part of Great Britain to rehabilitate that country. The Government of the United Kingdom agreed[4] to cancel £15 million of the sums advanced towards deficits on the Ordinary Budgets and the Frontier Areas Budget. The balance of the sums was to be repaid by Burma in twenty equal yearly instalments, beginning not later than 1 April 1952, no interest being chargeable. This was accepted by the Provisional Government as a 'further contribution by the Government of the United Kingdom towards the restoration of Burma's financial position and as a final liquidation of their claim in respect of the cost of supplies and services furnished to the British Military Administration in Burma'. The Provisional Government agreed to repay in full the sums advanced by the Government of the United Kingdom towards expenditure on various projects such as public utilities, according to the terms of existing agreements. Repayment would continue to be made from current receipts in excess of necessary outgoings and working capital, and from the proceeds of liquidation. The balance of advances then outstanding was to be repaid in twenty equal instalments beginning not later than 1 April 1952, no interest being chargeable.

Burma had its own financial system before it became independent, and Burmese loans had the status of trustee stocks.[5] The Governor was obliged to secure the provision of all requisite funds to meet claims, including pensions, of the United Kingdom.[6] Hence Burma's debt was a local one, and there is little doubt that it would have continued to be binding after the change of sovereignty. The Japanese occupation, however, had left Burma in a bankrupt condition, and the figure mentioned above had been advanced by the United Kingdom as an interest-free loan to enable Burma to discharge its indebtedness and balance the budget. Of this sum £8 million had been advanced during the financial year October 1945–September 1946, and it had been agreed that a further sum of £7½ million would be advanced which would be converted into an outright grant if the facts or further study warranted it.[7] This in fact was done when Burma became independent. The question of succession to debts, except in relation to the United Kingdom, did not, therefore, directly arise.

By the British North America Act, 1949,[8] Canada was to assume and provide for the servicing of the stock issued and to be issued on the security of Newfoundland, while the Ceylon (Constitution) Order in Council charged[9] on the Consolidated Fund of the Dominion all interest on the public debt, sinking fund payments, and the like.

5. *Pensions*. Pensions which before the partition of British India had been the liability of the Central Government or of one of the Provinces were to be unaffected by the change.[10] The solution that was devised for debts was applied also initially to pensions.

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[1] The Indian Independence (Liabilities) Order, 1948, s. 3 (3).

[2] Ibid., s. 3 (4)–(11).

[3] Ibid., s. 3 (9); *Proceedings of the Partition Council*, 1948–9, Case No. PC/216/20/47.

[4] Treaty of Recognition, loc. cit., Art. 6 (2).

[5] Government of Burma Act, 1935, 26 Geo. VI & Edw. VIII, c. 3, s. 65.

[6] Ibid., s. 58.

[7] Cmd. 7029 (1947).

[8] Loc. cit., s. 23.

[9] Loc. cit., s. 65.

[10] Indian Independence (Rights, Property and Liabilities) Order, 1947, s. 11 (1).

Those payable by the Central Government remained the responsibility of India,[1] while those which had obliged the Punjab and Bengal were to be the liabilities of those halves of these provinces embodied in Pakistan.[2] Officials whose service had not been terminated, and who were therefore not immediately entitled to pensions, were to receive from the Government of whichever Dominion they continued to serve the same conditions of service with respect to pensions as they had received before.[3]

Subsequently it was proposed by India that each Dominion should 'assume liability for the pensions paid in its territory' and those payable to officers who opted for its service and were accepted. This proposal was adopted by the Partition Council on 1 December 1947,[4] and embodied in the Indian Independence (Liabilities) Order, 1948, which transferred to Pakistan those pensions which either before or after the partition had been payable at a Government treasury, post office, or other place situate in that Dominion after the partition.

Burma, it was announced by the Prime Minister in the House of Commons on 12 August 1947,[5] was to 'accept liability for pension or proportional pension earned by service under the Secretary of State'. In the Treaty of Recognition the Provisional Government later reaffirmed their

> 'obligation to pay to British subjects domiciled on the date of the coming into force of the present Treaty in any country other than India and Pakistan all pensions, proportionate pensions, gratuities, family pension fund and provident fund payments and contributions, leave salaries and other sums payable to them from the revenues of Burma or other funds under the control of the executive authority of Burma, in virtue of all periods of service prior to that date under the rules applicable immediately prior thereto'.[6]

All pensions payable to officials of the Ceylon administration were to be a charge on the Consolidated Fund established in the Dominion for the servicing of the public debt.[7]

6. *Public property*. The British North America Act, 1949, provides[8] for the passing to Canada of certain categories of public property in Newfoundland, and for the partition between the Dominion and the Province of public buildings.[9]

Burma before it became independent owned public property in its own name and was liable to suits in respect of it.[10] There was therefore no need to define what property vested in the Provisional Government.

The division of property between India and Pakistan gave rise to problems some of which are still unsettled. Difficulty, for example, has been encountered in dividing the Congress library and the amenities of legations in foreign countries. The Indian Independence (Rights, Property and Liabilities) Order did no more than generalize. It provided for the division of Crown lands according to their situation.[11] Other property which was vested in the King for the purpose of the Central Government was, in the interim, to vest in him for the joint purposes of the Dominions,[12] and the Partition Council which had been set up was to allocate the various assets and apportion current earnings of foreign exchange.[13] Funds of the Central Government and the partitioned

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[1] Indian Independence (Rights, Property and Liabilities) Order, 1947, s. 11 (2) (*a*).

[2] Ibid., s. 11 (2) (*b*) and (*c*).

[3] Indian Independence Act, loc. cit., s. 10.

[4] *Proceedings of the Partition Council*, 1948–9, Case No. PC/195/20/47.

[5] Cmd. 7189 (1947).

[6] Loc. cit., Art. 4.

[7] Ceylon (Constitution) Order in Council, loc. cit., s. 64.

[8] Loc. cit., s. 33.

[9] Ibid., s. 34.

[10] Government of Burma Act, 1935, loc. cit., Part X.

[11] Loc. cit., ss. 4 and 5.

[12] Ibid., Art. 7.

[13] Indian Independence (Partition Councils) Order, 1947. Disputes were to be referred to an arbitral tribunal constituted under s. 7 of the principal Act by virtue of the Indian Independence (Arbitral Tribunal) Order, 1947, s. 4.

Provinces were to be divided,[1] and it was arranged[2] that the Government of India would pay to that of Pakistan that portion of the Government's bank profits in respect of the period commencing on 1 July 1947 and ending on 30 September 1948, which bore to the total of such profits in respect of this period the same proportion as the total value of the Pakistan notes in circulation in that Dominion on 30 September 1948. As soon after that date as practicable there was to be transferred from the Issue Department of the Bank to the Government of Pakistan assets which had together a value equal to the total liability in respect of Pakistan notes in circulation on that date.[3] Questions of taxation assessment were to be settled by agreement between the Central Boards of Revenue of the two Dominions.[4] It was also laid down that where either of the Dominions or any Province became entitled to any property or obtained any other benefits, and it was 'just and equitable' that that property or those benefits should be transferred to or shared with the other Dominion, or with any other Province, then they were to be allocated in such a manner as, in default of agreement, might be determined by the Arbitral Tribunal set up for this purpose.[5]

In the case of Palestine, provisional arrangements were made as follows: Government funds were to be transferred to trustees;[6] sinking fund accumulations held by trustees nominated by the Treasury under the Palestine Loan Ordinance of 1942 were to continue to be held by the trustees in trust for the repayment of the principal moneys;[7] sinking funds held by the Crown Agents in trust for the Government of Palestine under any Ordinance providing for the issue of bearer bonds should vest in the Crown Agents and be held by them until the Secretary of State should direct the transfer of the funds to some authority or authorities succeeding to the Government of Palestine.[8]

7. *Law and the judicial system.* The body of law of British India as it existed immediately before the partition became *mutatis mutandis* that of Pakistan.[9] So far as India was concerned, it was enacted that all British Indian laws were, after the change, to be construed as operating only within the boundaries of the Dominion.[10]

By virtue of the British North America Act, 1949,[11] laws operating in Newfoundland were to continue so to operate until repealed or altered by the Parliament of Canada or that of the new Province, and Canadian statutes were only to come into force in the Province when extended by Act of the Canadian Parliament, or by Proclamation of the Governor-General in Council.[12] The Palestine Act, 1948, provided that all enactments of the United Kingdom Parliament relating to Palestine were to cease so to relate.[13] Certain statutes were repealed in so far as they referred to Burma,[14] while those which were to remain in force in Ceylon were specified in the Second Schedule to the Ceylon Independence Act, 1947.[1]

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[1] Indian Independence (Rights, Property and Liabilities) Order, 1947, loc. cit., s. 6.

[2] Pakistan (Monetary System and Reserve Bank) Order, 1947, Part IV, s. 1 (2).

[3] Ibid., s. 4 (1). S. 4 (6) apportions the reserve funds of the bank on the basis of the uncovered debt.

[4] Indian Independence (Income Tax Proceedings) Order, 1947.

[5] The Indian Independence (Rights, Property and Liabilities) Order, 1947, s. 13 (1).

[6] The Termination of Jurisdiction in Palestine (Transitional Powers) Order in Council, 1948, loc. cit., s. 3.

[7] Ibid., s. 4.

[8] Ibid., s. 5.

[9] Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947, s. 3, giving effect to s. 18 (3) of the principal Act. The Schedule contains the necessary modifications.

[10] India (Adaptation of Existing Indian Laws) Order, 1947, s. 4. Machinery provisions are contained in the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, and the Indian Independence (Adaptation of Bengal and Punjab Acts) Order, 1948.

[11] Loc. cit., s. 18 (1).

[12] Ibid., s. 18 (2).

[13] 11 & 12 Geo. VI, c. 29, s. 3.

[14] Schedule to the Burmese Independence Act, 1947. 11 & 12 Geo. VI, c. 3.

Actions brought against the Secretary of State in respect of the liability of Burma were to abate on the transfer of sovereignty.[2] With respect to British India, it was enacted that actions and rights of action against the Secretary of State were to cease; in England they were to be brought against the High Commissioner, and in India against such other person as the Governor-General should designate.[3] Where the Governor-General in Council was a party to any legal proceedings in British India with respect to the rights, property, and liabilities apportioned between India and Pakistan, the Dominion succeeding to them was deemed to be substituted for him, and the proceedings were to continue accordingly.[4] A like arrangement was made in respect of the Provinces. Proceedings which immediately before the partition were pending elsewhere than in the United Kingdom by or against the Secretary of State in respect of a liability of the Governor-General in Council or a Province were to be continued against the Dominion or Province which succeeded to the liability.[5] Where the Governor-General in Council was a party to proceedings in respect of 'actionable wrongs other than breach of contract' the liability was to become that of the Dominion within whose territory the cause of action wholly arose.[6]

All proceedings pending at the date of the change were to be continued in the court in which they were instituted, but thenceforth appeals from such proceedings were to be subject to the jurisdiction of the court in which such appeals would ordinarily lie if the proceedings had been commenced in the proper court.[7] The British North America Act, 1949, provided for the continuance of jurisdiction of Newfoundland courts.[8]

8. *Nationality*. The Burmese Independence Act, 1947, employed[9] the test of birth for determining the class of person who was to cease to be a British subject and was to become a national of the new state. Such a person was one born in Burma or whose father or paternal grandfather was born there, and a woman, who, though alien at birth, became a British subject through her marriage with such a person. A person was to be exempted from the change, however, whose father or paternal grandfather was born outside Burma in territory which was at the time of his birth British, or within the King's jurisdiction, provided that the father or grandfather as the case might be was a British subject before the change of sovereignty; or whose father or paternal grandfather became a British subject by naturalization or annexation of territory outside Burma.

Anyone who ceased to be a British subject in virtue of these provisions, and was immediately before the Act came into force domiciled or ordinarily resident in any part of the British dominions, might, by declaration made before the expiration of two years from the appointed day, elect to remain a British subject. If he so elected, he was to be deemed never to have lost his British nationality. The declaration might include children under eighteen years. In addition, anyone who ceased to be a British subject, but who was not qualified to become a subject of Burma, and was not within the category of persons having the right to elect, should nevertheless have the option extended to him.[1]

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[1] 11 & 12 Geo. VI, c. 7.

[2] Burmese Independence Act, loc. cit., s. 4 (2).

[3] Indian Independence Act, loc. cit., s. 15.

[4] The Indian Independence (Rights, Property and Liabilities) Order, 1947, s. 12 (1).

[5] Ibid., s. 12 (3).

[6] Ibid., s. 10 (1).

[7] The Indian Independence (Legal Proceedings) Order, 1947. Several orders gave jurisdiction to the courts of one Dominion to entertain suits or appeals against the other Dominion; for example, the High Courts (Bengal) Order, 1947, provided that, in the case of appeals pending before the Calcutta High Court on 15 August 1947, the East Bengal High Court should have exclusive jurisdiction to decide the appeal if the court of origin were in East Bengal, regardless of whether the suit was for land or not, or whether the land was in East Bengal or not.

[8] Loc. cit., s. 18 (4).

[9] Loc. cit., s. 2 (1) and First Schedule.

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[1] Loc. cit., s. 2 (2) and (3).

DECISIONS OF ENGLISH COURTS DURING 1948–1949 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. Public International Law

Jurisdictional Immunities of Foreign States

1. The case of *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, [1949] 1 All E.R. 946, was concerned with the extent of the immunities of a sovereign state in respect of property in its possession or control. In May 1939 the plaintiff French company purchased sixty-four bars of gold, and lodged them for safe custody with a bank in France. In August 1944 the gold bars were forcibly seized from the bank by the Germans and carried off to Germany. After the invasion of Germany by the Allied Armies the gold bars were found by United States forces in the United States Zone of occupation and placed in the custody of the United States military authorities. By Part III of the Agreement on Reparation from Germany, dated 14 January 1946, signed by representatives of eighteen Allied Governments, all the 'monetary gold' found in Germany by the Allied forces was to be pooled for distribution among the participating countries in proportion to their losses of gold through looting or by wrongful removal to Germany. In September 1946 a Tripartite Commission for the restitution of monetary gold was set up by the Governments of the United Kingdom, the United States, and France, for the purpose of applying the terms of Part III of the Agreement. The term 'monetary gold' was not defined in the Agreement, nor was 'non-monetary gold' defined. In March 1948 the Bank of England was requested by the Treasury to open a gold set-aside account in the name of the Treasury on account of 'the governments of the United States, the United Kingdom and France', the account to be operated by the representatives of these three Governments on the Tripartite Gold Commission. The Bank said it would make charges for operating the account, and so became a bailee for reward. In June 1948 the plaintiffs claimed the gold bars from the United States Occupation Authorities, and were informed that the bars were then at a depository in Frankfurt and that their disposition was subject to the orders of the Tripartite Gold Commission. In the following June, under the orders of the Commission, which apparently regarded them rightly or wrongly as 'monetary gold', the bars were sent to England and deposited in the set-aside account with the Bank of England. In the present action by the plaintiff company against the Bank of England claiming delivery of the bars or damages for their conversion, the Bank contended that the Court had no jurisdiction to entertain the action on the ground that the gold bars were in the possession or control of the Governments of the United States, France, and the United Kingdom, and that the action accordingly impleaded two 'foreign sovereign states, namely the governments of the United States of America and the Republic of France, who decline to submit to the jurisdiction'.

Jenkins J. held that the Court had no jurisdiction to entertain the suit. Dealing first with the scope of the general principle of immunity from jurisdiction it was to be noted that 'in cases in which the foreign sovereign is not itself sued but which concern property in which the foreign state claims some proprietary or possessory interest, then in the absence of a proved or admitted right of property in the foreign sovereign state, possession or control by it of the thing in suit is a condition essential to the application of the principle'. A mere claim by a foreign sovereign state would not oust the jurisdiction; as appeared from the speech of Lord Maugham in *The Cristina*, [1938] A.C. 485, and the decision of the Court of Appeal in *Haile Selassie* v. *Cable and Wireless Ltd.*, [1938] 3 All E.R. 384. Further it seemed that where property was subject to a trust the court had jurisdiction to administer the trust at the suit of any person interested, even though the persons interested included a foreign sovereign state which did not submit to the jurisdiction (*Gladstone* v. *Musurus Bey* (1 Hem. & M. 503) and *Larivière* v. *Morgan* (1872), 7 Ch. App. 550). The plaintiffs had argued, however, that there was this further general limitation on the principle, that where the foreign sovereign state was not actually a party to the proceedings, the immunity applied only where the action was *in rem* and not in an action *in personam*; for a judgment *in personam* would not then bind the foreign sovereign who would still be free to assert his interest in the property. His Lordship could not agree that any such limitation could be drawn from the authorities. Furthermore it would be inconsistent with the corollary of the principle of immunity that the municipal court would so exercise its jurisdiction as to put a foreign sovereign to election between being deprived of property owned by him or in his possession or control, or else submitting to the jurisdiction of the court.

His Lordship then turned to examine whether the principle of immunity thus defined was applicable in the present case, and he decided that it was so applicable for the following reasons.

(i) The three Governments of the United Kingdom, the United States, and France were in possession or control of the gold bars for the purpose of establishing the immunity even though the bars had been deposited with the defendant bank; for the documents showed that His Majesty's Treasury had opened the account with the bank as an account for the three Governments whose representatives on the Tripartite Commission were to operate it. The Treasury had not acted merely for the British Government but as an intermediary for the three Governments jointly. 'I fail to see', said His Lordship, 'how I, for the purpose of investing myself with jurisdiction can ascribe to His Majesty's Government a claim which it does not make to the effect that the gold is held solely by His Majesty's Government, to the exclusion of the other two governments concerned.'

Nor could he agree with the contention that the bank as a bailee for reward was itself in sole possession of the gold bars and that therefore the three Governments were mere claimants to property in the possession of a third party; for it was clear from the judgment of the Court of Appeal in *Ancona* v. *Rogers* (1876), 1 Ex. D. 285, that the bailor still had a possession in such cases. He saw no ground for the view that the term 'possession', when used in connexion with the immunity, was used in any specially narrow or restricted sense confined to actual physical possession.

> 'A foreign sovereign state (unless embodied in a personal sovereign visiting this country) cannot, so far as I can see, be in actual physical possession of property here otherwise than by its servants. Accordingly, if actual physical possession by a foreign sovereign state were essential to immunity on the score of possession by such state, immunity on that ground could only be claimed in respect of property in this country in the actual physical possession either of some personal sovereign or of a person who could be shown to be in the strict sense a servant of a foreign sovereign state (so as to make his possession that of his master) or else to be himself entitled to diplomatic immunity.'

(ii) Even if the three Governments were not in possession of the gold bars, they were in control of them. 'I can imagine no better example of control than the case of property deposited with a bank for safe custody and disposed in accordance with the directions of the depositor.'

(iii) The principle of immunity could not here be excluded because the possession and control were vested in the two foreign sovereign Governments jointly with the British Government. The mere fact that one of the Governments interested in the property could be sued (under the Crown Proceedings Act, 1947) could not confer a jurisdiction over the other two Governments.

(iv) If it were the case (*sed quaere*) that the possession or control must be for public purposes, there could be no doubt that the gold bars were held by the three Governments for such purposes; and this was none the less so because they were public purposes not merely of the three Governments but also of the other Allied Governments party to the Agreement of 14 January 1946.

Finally His Lordship turned to the argument of the plaintiffs that even if the immunity applied it would not be infringed by giving relief in the form of damages instead of an order for the delivery. A claim to damages, however, must be founded on the self-same cause of action as a claim to an injunction, namely an alleged wrongful detention of the gold bars by the bank; for the present case was not at all comparable with cases in which a claim to damages was based upon the commission of an independent wrong (as in *The Crimdon* (1918), 35 T.L.R. 81). The possession by the bank could not be distinguished from the possession by the three Governments. The bank was in possession simply in right of the three Governments and had no independent interest or title whatsoever. The bank could not be said to be wrongfully in possession without holding that the three Governments were wrongfully in possession. 'I should like to add that I have great difficulty in appreciating how the court could have jurisdiction to order the bank to pay damages (in effect) for failing to do that which the court has no jurisdiction to order it to do.' Moreover, to allow relief by way of damages would be indirectly to interfere with the sovereign state's exercise of its possession or control over property; for it would be unwarrantable to hold that a foreign sovereign state in possession or control of property in this country could not entrust such property to an agent for safe custody without exposing such agent to the risk of being sued in damages by third parties for wrongful possession. Looking at the substance of the whole matter this was an attempt to sue indirectly the three Governments concerned.[1]

2. *Krajina* v. *The Tass Agency & Another*, [1949] 2 All E.R. 274, again raised in a different form the question of the extent of the jurisdictional immunity of foreign states. The decision of the Court of Appeal adds nothing to existing law and is more interesting for the problems it suggests than for the actual issue before the court. The plaintiff had issued a writ, claiming damages from the Telegraphic Agency of the Union of Soviet Socialist Republics [Tass] for an alleged libel published by them in a weekly newspaper called *The Soviet Monitor*. The defendants entered a conditional appearance, and then moved to have the writ set aside on the ground that they were a department of the Soviet State and, therefore, immune from the jurisdiction. The Master's Order setting aside the writ was upheld by Birkett J., and the plaintiffs appealed. In support of their motion, the defendants put in an affirmation by the legal adviser to the Soviet trade delegation in the United Kingdom containing a summary of the 1935 Soviet Statute setting up Tass and describing Tass as 'the central information organ of the Union of Soviet Socialist Republics', and as 'coming under the Council of Ministers of the Union of Soviet Socialist Republics'. The only other evidence before the Master had been an entry in the Register of Business Names. Subsequently, however, an affidavit was put in exhibiting a certificate from the Soviet Ambassador, which stated that Tass 'constitutes a department of the Soviet State, i.e., the Union of Soviet Socialist Republics, exercising the rights of a legal entity'. Before the Court of Appeal, Counsel for the plaintiffs was granted leave to put in evidence the full text of the Statute establishing the Tass Agency. The Statute described Tass as being 'attached to the Soviet of Peoples Commissars of the U.S.S.R.', defined its duties, made it clear that the Soviet of Peoples Commissars retained full control of Tass, and stated in Clause 15, to which some importance was attached by Counsel, that 'the Telegraphic Agency of the U.S.S.R. and the Telegraphic Agencies of the Union Republics enjoyed all the rights of a juridical person'.

The argument of the plaintiffs before the Court of Appeal may be summarized under three headings:

(i) Tass, it was said, was a legal entity, separate from the Soviet State, and therefore the sovereign immunity did not attach to it. Being a separate legal entity, it was not analogous to the United States Shipping Board, which the Court of Appeal had held in *Compania Mercantil Argentina* v. *United States Shipping Board* (1924), 93 L.J.K.B. 816, to be immune from the jurisdiction of the Court.

(ii) Even if Tass were a department of the Soviet State, the nature of its activities was such as to deprive it of sovereign immunity, though here Counsel admitted that this argument could not succeed before the Court of Appeal, which was bound by the *United States Shipping Board* case and by *The Porto Alexandre*, [1920] P. 30. He referred, however, to the observations of Lords Thankerton, MacMillan, and Maugham in *The S.S. Cristina*, [1938] A.C. 485 (see this *Year Book*, 19 (1938), p. 243 at p. 246).

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[1] The decision of Jenkins J. has since been reversed by the Court of Appeal, before which new facts were available. See [1950] W.N. 144.

(iii) The evidence in support of Tass's case was ambiguous, and as the onus was on them to establish their right to immunity their application must fail.

The appeal was dismissed. The Court rejected the argument that the registration of Tass under the Registration of Business Names Act, 1916, was prima facie evidence that it was a foreign corporation. The legal nature of the agency must on the contrary 'depend on its constitution and must be a question of Russian law'. On this matter, Cohen L.J. said:

> 'It is said in the translation of the statute and by the ambassador that it has the rights of a juridical or legal entity, but it seems to me that the evidence falls far short of that which would be necessary to establish that Tass is a legal entity and that the Union of Soviet Socialist Republics, by procuring its incorporation, has deprived that particular department of the immunity which normally attaches to a department of a sovereign State in accordance with the principles of comity established by international law and recognized by this country.'

Regarding the onus of proof, the defendants had established that Tass was a department of State to the extent necessary to shift the onus of proving that they were a separate legal entity to the plaintiff. That onus he had failed to discharge. That being so, the case was on all fours with the *United States Shipping Board* case and that concluded the matter. His Lordship added that even if he had come to the opposite conclusion, that Tass has been given the status of a separate juridical entity, it did not seem to him that it would necessarily follow that it would thereby have been deprived of its immunity. It seemed to him, taking an analogy from English law, that the tendency of British legislation showed that 'a State may for certain purposes under its own legislation give some department of State the status and the rights of a juridical entity without depriving the department of its general immunity from suit. . . . One must look in every case at the facts to reach a conclusion whether the Crown has intended to give up its immunity generally or only for limited and defined purposes'.

Tucker and Singleton L.JJ. gave judgments to the same effect.

Recognition. Retroactive Effect of Recognition

3. *Boguslawski and another* v. *Gdynia-Ameryka Linie*, [1950] 1 K.B. 157, concerned the limits of the doctrine of retroactivity of recognition of governments. The plaintiffs had been in the employment of the defendants, who were a Polish shipping company with its headquarters in London. On 5 July 1945 the plaintiffs ceased to be so employed and thereupon claimed from the defendants compensation on the basis of three months' salary, to which they were entitled under an agreement of 3 July 1945, made between representatives of the Polish Seamen's Union on the one hand and the Minister of Industry, Commerce and Shipping of the Polish Government in London on the other. In making this agreement the Minister acted on behalf of Polish shipping companies under powers given to him by legislation of the legitimate Polish Government originally formed in Warsaw and now established in London. On 28 June 1945 the so-called provisional Polish Government of National Unity had been formed at Lublin in Poland. A certificate of the British Foreign Secretary stated on behalf of His Majesty's Government that up to and including midnight of 5/6 July 1945 His Majesty's Government recognized the Polish Government having its headquarters in London as the Government of Poland, but as from midnight of 5/6 July 1945 recognized the Polish Provisional Government of National Unity as the Government of Poland; and that His Majesty's Government from that date ceased to recognize the Polish Government in London as the Government of Poland.

The defendants refused to pay compensation on the ground (*inter alia*) that on 3 July 1945, when the compensation agreement was made, the Minister of the Polish Government in London no longer had authority to make an agreement on behalf of any Polish shipping company, because the recognition of the Lublin Government by His Majesty's Government must be taken to have had retroactive effect to 28 June, the date when the Lublin Government was formed.

Finnemore J. gave judgment for the plaintiffs. The only point which concerns public international law is the decision on the argument of the defendants that, the British recognition of the new government being retroactive to the time of its establishment on 28 June, the Minister of Shipping of the London Government had no authority to make the arrangements he did make. His Lordship conceded that *Luther* v. *Sagor*, [1921] 3 K.B. 532, clearly established that 'when this country recognizes a government of a foreign country as being the government, the recognition dates back to the time when that government became the effective *de facto* government'. The present case, however, was different for two reasons. First, the London Government was clearly the only government which in fact had at the material time any control whatever over the Polish ships and seamen with whom they were concerned. Secondly, the certificate of the British Foreign Secretary was in an unusual form, in that it said the precise date and hour at which the new government was recognized. It was quite true, as the Secretary of State had said in his certificate, that the question of retroactive effect of recognition was a matter to be decided by the courts. Nevertheless, the question seemed to be resolved by the form of the certificate, which must be taken to mean what it said. 'Where the government of this country', says his Lordship, 'in terms certifies that it recognizes one government up to midnight on 5/6 July, and another government thereafter, the acts done by that government recognized up to midnight in this country while it was still recognized as the government, must be valid.'

Extradition and Asylum

4. The arrest of Mr. Eisler, a German-born communist from the United States, on the Polish liner *Batory*, whilst she was lying in Cowes roads *en route* for Gdynia on 14 May 1949, raised an interesting question concerning the jurisdiction of states over foreign merchant vessels in national waters. The warrant was issued under the Extradition Act, 1870, at the request of the United States Government. Eisler was actually released on 27 May after the Chief Magistrate at Bow Street had found that the requisitioning power had failed to show that Eisler had been convicted in the United States of an extraditable offence. In the meantime, however, the Polish Government had protested against the arrest on the ground that Eisler was a political refugee, entitled under international law to asylum and protection under the Polish flag, and that a state's jurisdiction over territorial and national waters did not entitle the state to arrest persons on board a foreign vessel for the purpose of extradition to a third state. The British Government replied (see *The Times* newspaper, 9 June 1949) that, if the Polish Government were right,

> 'it would mean that States could grant to persons on board their merchant and passenger ships in foreign ports or waters the same asylum that a State can grant to persons on its territory. It was, however, quite contrary to the practice of States to recognize any principle of asylum in connexion with merchant ships, and the Polish Government had refused it in the case of offences committed by persons who subsequently went on board a foreign ship in a Polish port. The absence of any right to grant asylum on board merchant ships sprang from a universally recognized principle of international law that a merchant ship in the ports or roadsteads of another country falls under the jurisdiction of the coastal State.'

R. Y. Jennings

B. Private International Law

Proof of Foreign Law

No. 1. Where the evidence of the experts on foreign law is conflicting, English courts have not adopted a uniform attitude in deciding to what extent their own powers permit them to give an independent interpretation of foreign law as led in evidence. According to one view expressed as early as 1863 in *De Sora* v. *Phillips*[1] and implied in recent times in *De Beéche* v. *South American Stores*,[2] English courts, in these circumstances, have an unfettered power to interpret foreign codes and statutes on their own. According to a second view 'the court is not entitled to construe a foreign code itself . . . the text of the foreign law, if put in evidence by the experts, may be considered, if at all, only as part of the evidence, and as a help to decide between conflicting expert testimony'.[3] In *Rouyer Guillet et Cie* v. *Rouyer Guillet & Co. Ltd.*[4] the Court of Appeal dismissed interlocutory applications to stop the plaintiffs' action for passing-off. The applications involved the construction of a French statute and of a document which contained the articles of association of the French Company. The evidence of the expert witnesses was conflicting. In these circumstances Lord Greene held that both as regards the construction of private documents involving French law, French rules of interpretation, and French technical terms, and as regards the interpretation of foreign statutes, the evidence of the experts was to be considered in the first place, and not the text of the law. However, if the experts differed as to its meaning, an English court was entitled and bound 'to apply its own mind, fortified by the opinion of the witnesses and giving what weight it thinks to be given to it, to the text itself and to examine it in order to make up its mind on the question of interpretation as between the two sets of witnesses'.

It is not clear whether these words indicate that the Court of Appeal has taken sides in the conflict described above. They do indicate, however, that the Court of Appeal drew no distinction between the technique to be applied when expert opinion is divided on a question of foreign law raised incidentally in connexion with the interpretation of a document, and when foreign law as such is in issue as the basis of the claim prosecuted in the court.

Domicil

No. 2. *Donaldson* v. *Donaldson*[5] is a useful decision inasmuch as it establishes that a serving member of the armed forces can acquire a domicil of choice in the place where he is stationed in the exercise of service requirements. The parties were originally domiciled in England where the respondent husband held a commission in the Royal Air Force. In 1940 he was posted to Florida on duty. He was joined there by the petitioning wife and the children of the marriage. In 1944 the petitioner obtained a decree of divorce from a court in Florida, on the ground of mental cruelty. Subsequently the respondent went through a ceremony of marriage in the United States with an American woman and the petitioner returned to England where she, too, went through a form of marriage. In due course the respondent also returned to England. The petitioner asked for a decree of divorce in England on the ground that the respondent had committed adultery by marrying a second wife while the first marriage was still subsisting. It was admitted that if this argument was well founded, the petitioner had also committed adultery by going through a second form of marriage. The question was, therefore, whether the decree of the court in Florida was valid, and this, in turn, depended upon whether the respondent could and did acquire a domicil of choice in Florida.

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[1] 10 H.L.C. 624, 636.

[2] [1935] A.C. 148, 157. See also *Guarantee Trust Co.* v. *Hannay*, [1918] 2 K.B. 628, 638; *Sinfra A.G.* v. *Sinfra Ltd.*, [1939] 2 All E.R. 675; *Graumann* v. *Treitel*, [1940] 2 All E.R. 188, 196; *Kolbin* v. *Kinnear*, [1930] S.C. 724, 737, 748.

[3] *Lazard Brothers* v. *Midland Bank*, [1933] A.C. 289, 298.

[4] [1949] 1 All E.R. 244; 92 Sol. J. 732.

[5] [1949] P. 363; (1949), L.J.R. 762; 65 T.L.R. 233; 93 Sol. J. 220; [1949] W.N. 62.

As regards the capacity of serving members to acquire a new domicil, Ormerod J. said: 'The fact that his service duties would take him away from Florida for some considerable time would not affect the matter so long as he was then living in Florida and had determined to continue to live there when he could.' This statement of the law is in agreement with Rule 17 (10) of Dicey's *Conflict of Laws*, as set out in the 6th edition of that work.[1] It is also supported by the decision of the Court of Session in *Sellars* v. *Sellars*.[2]

As regards the requirement of residence with the *animus manendi*, Ormerod J. held that a fixed intention of the respondent to reside in Florida, based upon the conviction that divorce proceedings would bring his service career in England to an end, and in compliance with the wish of the American lady whom he intended to marry, was sufficient if existing at the time when the court in Florida pronounced the decree. The fact that the respondent subsequently returned to England since his service career did not come to an end and his second wife abandoned her desire to reside in the United States was irrelevant. Inasmuch as this decision shows a relaxation of the strict requirements for proving the acquisition of a new domicil, it must be welcomed not only on the ground that it renders jurisdiction in divorce a little more flexible, but also because it refuses to attach undue significance to events which occurred subsequent to the date in respect of which the establishment of a domicil of choice in Florida was relevant.[3]

No. 3. In *Re Wallach (deceased), Weinschenk* v. *Treasury Solicitor*[4] it was contended by the plaintiff that, upon the death of her husband, the wife automatically reacquires her last domicil prior to the marriage. In the present case the husband, who had acquired a domicil of choice in England, died in 1943, five days before his wife. He had a German domicil of origin; the domicil of origin of the wife was either French or German. The marriage took place in Frankfurt in 1906, and in 1939 the husband acquired a domicil of origin in England where the spouses resided until their death. The plaintiff claimed as the lawful second cousin of the deceased wife to be entitled to share in her estate according to French or German law. If English law applied, the plaintiff was excluded, and the Crown was entitled to the estate as *bona vacantia*. The plaintiff's claim could only succeed if it could be shown that immediately upon her husband's death and without any change of residence, the wife had reassumed her French or German domicil.

Hodson J. cited with approval Dicey's *Conflict of Laws* (6th ed.), Rule 10, Sub-Rule 2 which stated: 'A widow retains her late husband's last domicil until she changes it.' He also quoted the speech of Lord Westbury in *Udny* v. *Udny*[5]: 'Other domicils, including domicils by operation of law, as on marriage, are domicils of choice.' Hodson J. held that, upon marriage, a woman exercises a choice and acquires a new domicil which, like any other domicil of choice,[6] can only be lost by abandonment. Since the deceased had not abandoned it after her husband's and before her own death, her domicil remained English, and the plaintiff's claim failed.

Marriage

No. 4. As a result of the judgments in *Srini Vasan* v. *Srini Vasan*[7] and *Baindail* v. *Baindail*[8] which established that a polygamous marriage concluded abroad between two persons whose personal law recognizes such marriages is to be recognized in England, it was held by Streatfeild J. in *R.* v. *Rahman*[1] that it was a criminal offence in the meaning of Section 39 of the Marriage Act, 1836, if a Mohammedan performs a marriage ceremony in England in a private house not registered for the solemnization of marriages and without a special licence. His Lordship concluded:

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[1] At p. 124; but see 5th ed., at p. 131.

[2] [1942] S.C. 206.

[3] Cf. Cowen in *International Law Quarterly*, 3 (1950), p. 74.

[4] [1950] 1 All E.R. 199; 66 T.L.R. 132; [1950] W.N. 40. See also above, pp. 207 ff.

[5] (1869), L.R. 1 Sc. & Div. 441, 457.

[6] For a criticism of this formulation see *International Law Quarterly*, 3 (1950), p. 259.

[7] [1946] P. 67; [1945] 2 All E.R. 21.

[8] [1946] P. 122; [1946] 1 All E.R. 342.

> 'There is, therefore, nothing to support the view that merely because this was a Mohammedan marriage—or purported to be a Mohammedan marriage—it is not recognizable in this country on the ground that polygamy is permitted in India, and, indeed, this bridegroom was married to a woman in India already. It does not prevent this from being the solemnization of a marriage, even although it should turn out that by the law of this country, he already being married, it was an invalid marriage. It was, in my opinion, none the less the solemnization of a marriage and I construe the word "marriage" in s. 39 of the Act of 1836 as having the same meaning as it does in the Offences against the Person Act, 1861, s. 57.'

It follows, therefore, that the conclusion of the marriage in the circumstances constitutes a criminal offence notwithstanding the fact that, according to the principles of the conflict of laws, the marriage, being concluded in England in a form not recognized by English law, is invalid.

Nullity of Marriages and Divorce

No. 5. In 1948 it was held by the Court of Appeal in *De Reneville* v. *De Reneville*[2] that the courts of the husband's domicil are the proper courts to exercise jurisdiction where it is alleged that the marriage is voidable on the ground of wilful refusal to consummate. In that case the marriage ceremony had been performed in France and only the petitioning wife was resident in England, while the respondent husband was domiciled and resident in France. Consequently the English court refused to take jurisdiction. Two questions, however, remained open. Can English courts exercise jurisdiction where the marriage is alleged to be voidable and the parties are domiciled abroad if either (1) the marriage was celebrated in England or (2) both parties are resident in England? The first of these two alternatives was considered and rejected by the Court of Appeal in *Casey* v. *Casey*.[3] Bucknill L.J. with whom Somervell L.J., in a separate judgment, agreed on most points, referred to *Simonin* v. *Mallac*[4] and *Sottomayor* v. *De Barros*[5], which had been quoted by the petitioning wife, and distinguished them on the ground that in those cases the jurisdiction of English courts had been exercised for the purpose of determining the validity of a marriage as regards form or capacity. The case before the court was, however, not concerned with the question whether the marriage 'was valid in all respects so far as form and capacity was concerned'. It was 'merely voidable because of the wilful refusal of the husband to consummate it'. Apart from an *obiter dictum* of Gorell Barnes P. in *Ogden* v. *Ogden*,[6] it was clear that, in addition, English courts were prepared to exercise jurisdiction where it was alleged that the marriage concluded in England was void on the ground of bigamy.[7] Petitions for a decree of nullity on the ground that the marriage was voidable were more akin to petitions for the dissolution of the marriage, and the fact alone that the marriage had been celebrated in England was insufficient to confer jurisdiction upon English courts. Bucknill L.J. left the question open whether English courts would have jurisdiction if both parties had been resident in England, but Somervell L.J. was inclined to answer it in the affirmative. The question whether the marriage was voidable or void was determined by the law of the husband's domicil. In the absence of evidence, the law of the husband's domicil was presumed to be the same as English law.

The decision has been subjected to some critical comments,[8] but it would appear to merit approval. There is, of course, no reason for rejecting the jurisdiction in matters relating to voidable marriages of the courts of the country where the marriage has been celebrated, provided the law of the husband's domicil is applied. The difficulty arises thus: The laws of some countries ignore the distinction between voidable and void marriages; others attach a meaning to this distinction which differs from that adopted in England. Finally, as happened in *De Reneville* v. *De Reneville* and in the present case, the petitioner may omit to prove the content of the law of the husband's domicil with the result that English law is applied. Thus the danger is considerably increased that a marriage may be held to be voidable in England while it would not be voidable in the eyes of the courts of the husband's domicil. This danger does not arise where questions of form are involved, for English law would be applied as the *lex loci celebrationis*. It does also arise, however, to a limited extent, in the case where incapacity according to the law of the domicil is pleaded in England.

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[1] [1949] 2 All E.R. 165.

[2] [1948] P. 100: see this *Year Book*, 25 (1948), p. 429.

[3] [1949] P. 420; [1949] 2 All E.R. 110; [1949] W.N. 275; 65 T.L.R. 528.

[4] (1860), 2 Sw. & Tr. 67.

[5] (1877) 2 P.D. 81; 3 P.D. 1.

[6] [1908] P. 46, 80.

[7] *Linke* v. *Van Aerde* (1894), 10 T.L.R. 426.

[8] Fleming in *International Law Quarterly*, 3 (1950), pp. 9, 225; Graveson in *The Conveyancer*, 13 (1949), p. 394; Jackson in *M.L.R.*, 13 (1950), p. 242.

No. 6. When the Court of Appeal held, in *De Reneville* v. *De Reneville*, that jurisdiction in nullity cases is to be exercised exclusively by the courts of the husband's domicil, where the marriage is voidable, and can be exercised by the courts of the wife's premarital domicil, where the marriage is void, the court was quick to point out that the question whether a marriage is void or voidable is to be solved, in the case of voidable marriages, by the law of the husband's domicil. There was no need to determine which law determines whether a marriage is void, if the wife brings a petition in the courts of her own domicil on the ground that the marriage is void, but it may be assumed that the law of her own domicil was, in the opinion of the Court of Appeal, competent to determine this question. This leads, however, to two further complications:

In the first place, it may happen that the marriage is voidable according to the law of the husband's domicil and void according to the law of the wife's domicil. In this case two jurisdictions are involved, one of which is exclusive, although the other may be concurrent. Or the marriage may be void according to the law of the husband's domicil, and voidable according to the law of the wife's domicil. Finally, the marriage may be void according to the law of the husband's domicil, but valid according to the law of the wife's domicil.

In the second place, foreign legal systems do not usually adopt the distinction between void and voidable marriages. It is therefore necessary to decide according to which legal system the question must be characterized.

Both problems arose in *Chapelle* v. *Chapelle*[1] where the facts were as follows: In 1931 the petitioning husband, who was then domiciled in Malta, married the respondent wife at a register office in England. The wife was previously married to an Englishman, but the marriage had been dissolved. Since Maltese law did not permit a divorced person to marry again in the lifetime of the other spouse, the marriage was celebrated in England. The parties lived together in Malta until 1941, when the husband was posted abroad on active service and the wife returned to England. In 1944 the husband obtained a decree of nullity in the Civil Court in Malta on the ground that the marriage had not been celebrated in accordance with the provisions of the canon law as required by Maltese law[2] and was void *ab initio*. The Maltese court did not consider the question whether the marriage was void on the additional ground that the husband had no capacity according to the law of Malta to marry the respondent whose divorced husband was still living. In 1945 the husband acquired a domicil in England and, in order to test the validity of the Maltese decree, he brought a petition for divorce in England. On the application of the wife a preliminary issue was ordered to be tried to determine whether the English court had jurisdiction to dissolve the marriage, seeing that the marriage had been previously annulled by a Maltese court. It does not appear from the summary of the decision of the Maltese court whether according to Maltese law it is a principle affecting the formalities of marriage that all marriages concluded abroad in a form other than that sanctioned by canon law are void or whether the prohibition to marry in any other form is an incapacity only, affecting persons domiciled in Malta. The wife contended that the Maltese decree was to be recognized in England, seeing that she was domiciled in Malta at the relevant time either in virtue of her marriage or by choice.

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[1] [1950] 1 All E.R. 236; 66 T.L.R. 109; [1950] W.N. 41.

[2] Burge, *Commentaries on Colonial and Foreign Laws* (2nd ed.), vol. iii (1910), p. 209.

Willmer J. reserved the question of a domicil of choice in Malta and held that the court in Malta had no jurisdiction to declare the marriage void *ab initio* seeing that, if the marriage was void according to Maltese law, the wife had not acquired the domicil of her husband in virtue of the marriage. He referred to Dicey's *Conflict of Laws*,[1] *Salvesen* v. *Austrian Property Administrator*,[2] *Galene* v. *Galene*,[3] and *De Massa* v. *De Massa*,[4] which had been cited in support of the wife's contention, and distinguished them on the ground that in all these cases the parties unquestionably shared a common domicil. On the other hand, in the case before him, it followed from the Maltese decree of nullity that the wife did not acquire a common domicil in virtue of the marriage alone which, as it appeared from the Maltese decree, was never a valid marriage at all. For this conclusion Willmer J. referred to *White* v. *White*,[5] to Lord Greene's judgment in *De Reneville* v. *De Reneville*,[6] to the tentative observations of the learned editor of Dicey's *Conflict of Laws*,[7] and to certain *obiter dicta* of Sir Gorell Barnes P. in *Ogden* v. *Ogden*.[8]

This decision raises a number of questions which make it somewhat difficult to agree with the above conclusion:

1. It would now appear that where a marriage is alleged to be void, and the wife has either never acquired a domicil of choice in the country where the husband is domiciled, or has relinquished it, two decrees of nullity have to be obtained, if a limping marriage is to be avoided. For the decree of the courts of the husband's domicil will not be recognized by the courts of the wife's domicil, and there is no reason for holding that a decree given by the courts of the wife's domicil will be recognized by the courts of the husband's domicil, except in the situation which gave rise to the decision in *White* v. *White*.

2. It is well established that domicil is a connecting factor employed by English private international law and that it must be interpreted according to English law: *Re Annesley*, [1926] Ch. 692. Yet Willmer J. refused to do so on the ground that by Maltese law (though not by English law) the marriage was void *ab initio*. Thus he refused to recognize the Maltese decree and the nullity of the marriage but, for the purpose of characterizing the term 'domicil' as applicable to the wife, he applied Maltese law and recognized the effect of the decree upon the wife's domicil. However, to characterize according to the *lex causae* the term 'domicil' as applicable to a woman who is *prima facie* married, is no more justifiable[9] than to characterize the connecting factor 'place of contracting' according to the law which governs the contract, if validly concluded. Moreover, if the validity of the marriage according to Maltese law turned upon a question of formalities (as it probably did not) and not upon a question of capacity (as it probably did), Maltese law was not the *lex causae* according to English private international law, which determines the form of marriage according to the *lex loci celebrationis*, which was English.

3. It must be admitted that Bucknill J. (as he then was) in *White* v. *White*, and the Court of Appeal in *De Reneville* v. *De Reneville*, held that the courts of the wife's domicil have jurisdiction to annul a marriage which is void *ab initio*. But the characterization of grounds which render a marriage void or voidable differs from country to country. In England from the time of Blackstone onwards[10] bigamy and, subsequently, non-age have been regarded as avoiding the marriage *ab initio*. Today, the distinction is not always easy to draw,[11] and foreign law either ignores the distinction or applies it in a sense which

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[1] Rule 73 (1).

[2] [1927] A.C., at pp. 660, 662, 669, 670.

[3] [1939] P. 237.

[4] [1939] 2 All E.R. 150, n.

[5] [1937] P. 111.

[6] [1948] P. 100; [1948] 1 All E.R. 45 at p. 60.

[7] 6th ed., p. 383 (*d*).

[8] [1908] P. 46.

[9] See Cross in *International Law Quarterly*, 3 (1950), p. 247, at p. 250.

[10] *Commentaries*, vol. i (15th ed., 1809), pp. 434, 435.

[11] Cf. Dicey, p. 383 (*d*); Cross, loc. cit., p. 253.

differs from that employed in English law. Thus there are serious objections against characterizing as void, for the purpose of jurisdiction according to English private international law, a marriage which is treated as void according to foreign law on grounds and with effects which are not recognized in English law.

4. It may be doubted, moreover, whether the jurisdiction to be exercised by English courts under the rule in *White* v. *White* in the case of void marriages in the restricted sense as explained above (3) is exclusive or concurrent with that to be exercised by the courts of the husband's domicil, but, following Dicey's *Conflict of Laws*,[1] there appears to be no reason to exclude the jurisdiction of the courts of the husband's domicil, 'if the English court is satisfied that the marriage is void in the sense that no decree of nullity would have been required, if the allegations upon which the decree was founded were proved'. *A fortiori*, it would appear that the courts of the husband's domicil must have jurisdiction if the marriage is alleged to be void *ab initio* on grounds which are not known in English law or do not render the marriage void in England without a decree.

5. It may be noted that in *De Bono* v. *De Bono*[2] the Cape Provincial Division, on facts which were substantially the same as those in the case under review, had no hesitation in recognizing the decree of the court in Malta where the husband was domiciled. In New Zealand, any doubts as to the jurisdiction of the courts of the husband's domicil to grant a decree of nullity where the marriage is void *ab initio* were dispelled, in respect of war-time marriages, by the Matrimonial Causes (War Marriages) Act, 1947, No. 8. S. 6 (2) of that Act conferred jurisdiction in nullity upon New Zealand courts in respect of war-time marriages celebrated outside New Zealand where the marriage is alleged to be void *ab initio* and where the husband was at the time of the marriage domiciled in New Zealand and serving in any capacity in connexion with the war, and where the wife was, immediately before the marriage, domiciled outside New Zealand.

No. 7. The decision of Hodson J. in *Way* v. *Way*,[3] dismissing a number of petitions by British husbands to declare their marriages concluded with their Russian wives null and void, is the end of an attempt to deal by legal means with human relations closely linked up with complex political questions. The petitioners, all British subjects serving with the British Armed Forces in Russia, married between 1942 and 1945 at Russian Civil Registry Offices women of Russian nationality. Upon the failure of the Russian Government to allow the wives to join their husbands, the latter prayed for decrees of nullity on the ground, *inter alia*, that the formalities required by Russian law had not been complied with and that the requisite consent to marry had been wanting.

Hodson J. held that the formalities of marriage were governed by Russian law as the *lex loci celebrationis*. It was agreed that certain formalities required by Russian law had not been fulfilled when the marriage ceremonies were performed by the registrars, but in view of Section 2 of the Russian marriage law of 1926 which provided that 'registration of a marriage at a Civil Registry Office shall furnish conclusive evidence of the existence of the state of matrimony', Hodson J. held that the formal validity of the act of registration could not be questioned.

Following certain *dicta* in *Apt* v. *Apt*,[4] he distinguished between the method of giving consent and the fact of consent. While the former was governed by the *lex loci celebrationis*, the latter, in his opinion, was governed by the personal law of the parties. Thus, applying English law in order to test whether the petitioners had validly consented in fact to their respective marriages, he held that in the absence of mistake as to the identity of the person of the other party or of a mistake as to the true nature of the ceremony, lack of consent had not been proved. Failure to realize their expectation to obtain permits from the Russian Government allowing the wives to join their husbands abroad, to join their wives in Russia, or to be granted the right to require the other spouse to live in a common household did not affect the nature of the consent given at the time of the ceremony.

[1] p. 383 (*d*); Cross, loc. cit., p. 253.

[2] S.A.L.R., 1948 (2), p. 802.

[3] [1949] 2 All E.R. 959; 65 T.L.R. 707; [1949] W.N. 445.

[4] [1948] P. 83.

The application of the English law relating to consent to marry would appear to derive some support from a number of English[1] and Scottish cases[2] which leave it open whether English, Scottish, or German law applied as being the *lex loci celebrationis* or the personal law of one of the parties.[3] In *Mehta* v. *Mehta*[4] English law would appear to have been applied as the personal law of the petitioner, while in *Cooper* v. *Crane*[5] it could only be applied on the ground that it was the *lex loci celebrationis*. It would seem, however, that questions of consent to marry and of capacity to marry may well be linked together and that what appears to be want of consent or even an incapacity on the part of one spouse is only the reflex effect of an incapacity on the part of the other. It may perhaps be argued not so much that the absence of a duty between spouses, according to Russian private law, to cohabit but the inability, according to Russian public law, for a married woman of Russian origin who retains her Russian nationality upon her marriage to an alien, to emigrate and join her husband in his own country without the consent of the Russian Government creates an incapacity to conclude a marriage of the kind known in English law. It may perhaps be argued that such an incapacity can only be overcome by a previous consent of the Russian Government.

No. 8. *Boettcher* v. *Boettcher*[6] is yet another addition to the line of cases which decide in what circumstances a foreign decree of divorce given by a competent court is not to be recognized in England on the ground that the respondent was not properly served with notice of the proceedings, which therefore violated natural justice. Such recognition was refused when the petitioner caused the notice to be served by registered letter at an address where, to the petitioner's own knowledge, the respondent had never resided, and upon failure to reach the respondent, caused a notice to be published in the local newspaper: *Rudd* v. *Rudd*, [1924] P. 72. It was also refused where the petitioner had falsely stated that the residence of the respondent was unknown and had thus obtained leave to serve constructive notice in a local paper: *Crabtree* v. *Crabtree*, (1929) Sc. L.T. 675; *Scott* v. *Scott*, (1937) Sc. L.T. 632; *Bavin* v. *Bavin*, [1939] 3 D.L.R. 328. In the present case, the petitioning husband, then domiciled in Indiana, brought a petition for a divorce in the Circuit Court of St. Joseph County, South Bend, Indiana, against the respondent wife who was resident at all times in England. According to the law of Indiana, effective service on a respondent out of the jurisdiction could be made by a procedure whereby an advertisement is inserted in a local newspaper, a copy of which is sent by the clerk of the court to the respondent. Although that procedure was followed and the clerk was aware of the respondent's address in England, the notice never reached the respondent. Subsequently, on 1 May 1946, the Indiana court granted a decree of divorce on the ground of cruel and inhuman treatment by the respondent. The respondent first learnt of the decree in December 1947. In order to test the validity of the Indiana decree she petitioned for a decree of divorce in England in virtue of the Matrimonial Causes (War Marriages) Act, 1944, on the ground of cruelty. Wallington J. held that the procedure of service out of the jurisdiction under Indiana law was comparable to constructive service under English law and was not contrary to natural justice. The Indiana decree was therefore to be recognized in England. However, an ancillary question which was also raised deserves attention. Having determined that the proceedings were regular, Wallington J. had to decide, in the second place, whether the decree had effectively dissolved the marriage. According to the law of Indiana, the parties to a divorce could not conclude a second marriage until two years had elapsed since the decree of divorce was granted. Following *Warter* v. *Warter* (1890), 15 P.D. 152, 155, and *Le Mesurier* v. *Le Mesurier* (1930), 46 T.L.R. 203, his Lordship held that until the lapse of the specified time after the decree the marriage was not lawfully dissolved. However, seeing that at the time when the petition of the wife was heard the period of two years specified by the law of Indiana had lapsed, the marriage was dissolved, and the wife's petition for a divorce had to be dismissed. It was irrelevant that the marriage was still subsisting when the wife filed her petition.

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[1] *Mitford* v. *Mitford*, [1923] P. 130; *Valier* v. *Valier* (1925), 133 L.T. 830; *Hussein* v. *Hussein*, [1938] P. 159.

[2] *MacDougall* v. *Chitnavis*, [1937] S.C. 390; *Lendrum* v. *Chakravarti*, (1929) Sc. L.T. 96.

[3] See Dicey, *Conflict of Laws* (6th ed., 1949), p. 264.

[4] [1945] 2 All E.R. 690.

[5] [1891] P. 369.

[6] [1949] W.N. 83; 93 Sol. J. 237.

It would seem that *Boettcher* v. *Boettcher* is the first case in which a restriction to marry, imposed by a foreign decree of divorce, had to be considered in order to determine whether the decree of divorce was effective, and not in order to decide whether the parties to the divorce had the capacity to marry again before the period of restriction has lapsed. The restriction of the capacity to marry is important in the latter case, and is determined by the law governing the capacity of the parties to marry. It must be admitted that even here difficulties may arise if a party to a divorce subject to a restriction to remarry acquires a new domicil after the decree of divorce has been granted. See W. L. Morison in *Australian Law Journal*, 21 (1948–9), pp. 4–7.

But it may be doubted whether the restriction upon the capacity to marry imposed by foreign law has any necessary bearing upon the question whether or not the foreign decree is immediately operative. It is not a necessary consequence of such a restriction imposed by foreign law that the decree, like the order *nisi* in English law, 'determines the status of the parties, though its final operation is suspended and is subject to a contingency': *Fender* v. *Mildmay*, [1938] A.C. 1. at p. 45, *per* Lord Wright.

No. 9. In *Jacobs* v. *Jacobs*[1] the husband, who had obtained a decree of divorce in South Africa, where he was domiciled, on the ground of the adultery of his wife with the co-respondent, sued the co-respondent in England for damages. The latter contested the jurisdiction of the English courts, and the issue was ordered to be tried with the co-respondent as the plaintiff and the husband as defendant. The plaintiff contended that English courts had jurisdiction only if the husband was domiciled in England, in the case of divorce, or was resident in England, in the case of judicial separation, seeing that the action against the co-respondent was an ancillary proceeding. The defendant alleged that the action raised a claim in tort and was not ancillary to any other kind of relief. Pilcher J. held that English courts had jurisdiction. He examined, first, Section 33 of the Matrimonial Causes Act, 1857, which was replaced by Section 189 of the Supreme Court of Judicature Act, 1925. It provided as follows: 'Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.' The corresponding Section 189 (1) of the Judicature Act, 1925, provided: 'A husband may on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.' Pilcher J. held that the words 'any husband' in Section 33 and 'a husband' in Section 189 (1) did not refer, in the case of divorce, to husbands domiciled in England, and in the case of judicial separation, to husbands resident there. These words meant what they said, and if the claim was for damages only, it was not necessary that the husband should be domiciled or resident in England. His Lordship quoted from the judgment of Sir Samuel Evans P. in *Rayment* v. *Rayment*[2] where he said that the claim for damages against a co-respondent is an action in tort which can be entertained in England if the defendant is present there. As regards the independent nature of the action he referred, in addition, to *Kent* v. *Atkinson*;[3] for the application of the principle he referred to *Bell* v. *Bell and Cooke*.[4] There the plaintiff, who was domiciled in Scotland, where he had obtained a decree *nisi* on the ground of the adultery of his wife in Scotland, was allowed damages against the co-respondent in an action brought in England. Pilcher J. disregarded as *obiter dicta* the observations to the contrary of Scrutton L.J. in *Phillips* v. *Batho*[5] and of Bray J. who followed Scrutton

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[1] [1950] 1 All E.R. 96; 66 T.L.R. 121; [1950] W.N. 11.

[2] [1910] P. 271, 286.

[3] [1923] P. 142.

[4] (1932), *The Times* newspaper, 10 June.

[5] [1913] 3 K.B. 25, 32.

L.J. in *Harris* v. *Taylor*.[1] In *Phillips* v. *Batho*, it must be admitted, Scrutton L.J. expressed his opinion only for the purpose of allowing an action to enforce a judgment for damages against the co-respondent given by the court of the husband's domicil which had granted a dissolution of the marriage. He did not necessarily indicate that the jurisdiction of the courts which granted matrimonial relief was also exclusive as regards claims for damages against the co-respondent. It has been doubted[2] whether the words of Bray J. (whose decision was upheld by the Court of Appeal[3] on another ground) can be regarded as *obiter dicta*, but Bray J. only wished to lay down, for the purpose of the action before him, that the courts of the husband's domicil had jurisdiction in a claim for damages against the co-respondent and that the courts of the place where the co-respondent resided had not exclusive jurisdiction. There can be no question that the judgment of Pilcher J. deserves full approval.

No. 10. In *Wall* v. *Wall*[4] it fell to the court to consider for the first time in what circumstances it was to exercise jurisdiction in accordance with Section 8 of the Matrimonial Causes Act, 1937, whereby a married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to have it presumed that the other party is dead and to have the marriage dissolved.

The petitioner, who had an English domicil of origin, married in England in 1917 a private soldier in the Australian forces. Three months later he was posted abroad and, apart from one letter written soon after his departure, she never heard from him again. She now petitioned for a decree of presumption of death and of dissolution of the marriage. In the petition, the wife stated that the domicil of her husband, and therefore her own domicil, was in New South Wales. The Divorce Registry rejected the petition *in limine* on the ground that English courts could exercise jurisdiction in virtue of Section 8 of the Matrimonial Causes Act, 1937, only if the domicil of the parties was English. Upon application to the Judge for leave to file the petition on the ground that jurisdiction according to Section 8 was not exclusively based upon domicil in England, Pearce J. adopted the contention of the petitioner and directed that the petition should be filed.

Distinguishing between three types of jurisdiction in matrimonial matters, he held, first, that the courts of the domicil had exclusive jurisdiction to dissolve existing marriages. He held, secondly, that the courts of the domicil had jurisdiction, although not necessarily exclusive jurisdiction, having regard to considerations of convenience and hardship, in suits for relief not involving a dissolution of an existing marriage, but involving alteration of status (i.e. decrees of nullity where the marriage is voidable only). Thirdly, he held that the courts where the parties are resident, but not necessarily domiciled, had jurisdiction in all other matrimonial matters not involving status.

Since it was clear that jurisdiction under head (2) was not invoked, Pearce J. held that it was only necessary to decide whether a question of exclusive jurisdiction under head (1) was involved. He held that it was not, on the following grounds:

1. Dissolution of a marriage as a result of a decree of presumption of death in virtue of Section 8 (1) of the Matrimonial Causes Act, 1937, was not mentioned in the catalogue of new grounds for divorce, set out in Section 2 of the same Act.
2. Section 8 (3) of the Matrimonial Causes Act, 1937, declared some of the rules of procedure in matters of divorce applicable, but did not treat the proceedings for a decree of presumption of death and dissolution of marriage as a form of proceedings in divorce.
3. The primary purpose of a decree in virtue of Section 8 of the Matrimonial Causes Act, 1937, was to declare that the other party to the marriage was presumed to be

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[1] (1914), 111 L.T. 564, 568.

[2] *International Law Quarterly*, 3 (1950), p. 262, at pp. 264 ff.

[3] [1915] 2 K.B. 580.

[4] (1949), 65 T.L.R. 707; [1949] 2 All E.R. 959; [1949] W.N. 443.

dead in order to exclude the danger of a subsequent prosecution for bigamy. The decree dissolving the marriage was merely ancillary, was redundant in most cases, and was added only *ex abundanti cautela*.

4. The Matrimonial Causes Act, 1937, contained no jurisdictional provisions defining its application to cases involving a conflict of laws or of jurisdictions.
5. The decision of the Lord Ordinary in *Re Antanina Anskaitis or Labacianskas*,[1] according to which the courts of the domicil had exclusive jurisdiction to grant a decree of presumption of death and dissolution of marriage, could be distinguished, seeing that provisions of the Divorce (Scotland) Act, Section 5, upon which it was based, differed from the corresponding provision of the Matrimonial Causes Act, 1937.

In view of the statutory changes introduced by the Law Reform (Miscellaneous Provisions) Act, 1949, Section 1 (3),[2] it is only necessary to examine the questions of principle raised by this decision:

(*a*) The arguments summarized above (1), (2), and (3) to the effect that a decree of presumption of death is declaratory and does not affect status is supported by the corresponding decisions *in bonis Arthur Dowds*,[3] *in bonis Schulhof and Wolf*,[4] to the effect that declarations of death pronounced by the court of the foreign domicil of the person alleged to be dead are not binding upon English courts.

(*b*) The arguments set out above (4) and (5) raise controversial issues, but they have been put at rest, both as regards English and Scots law, by Section 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949, which has now provided a jurisdictional provision, and by Section 2 (3) which has eliminated the possibility of asserting that the provisions of Scots law differ from the corresponding provisions of English law. On the other hand, as Mr. Cross[5] and Dr. Kahn-Freund[6] have noted, the new Act has modified the effect of the decision in *Wall* v. *Wall* to a substantial degree in so far as the husband petitioner is concerned, and less extensively where the wife is the petitioner. For the purposes of a decree of presumption of death and dissolution of marriage, a husband petitioner can only apply to an English or Scottish court if he is domiciled within the jurisdiction. A wife petitioner can apply either if her husband was domiciled within the jurisdiction, or if she is resident there and has been ordinarily resident there for three years immediately before the proceedings are begun. This apparent inequality between husband and wife is justifiable on grounds which also underlie Section 13 of the Matrimonial Causes Act, 1937. There is always some factual and physical connexion between the husband and his domicil. In the case of the wife, especially if she has been deserted or has not heard from her husband for a long time, her legal domicil is notional only.

Maintenance Orders

No. 11. The decision of the Court of Appeal in *Forsyth* v. *Forsyth*[7] noted in the previous volume of this *Year Book*[8] established that English Courts of Summary Jurisdiction have no power to make Maintenance Orders in virtue of the combined effect of Section 1 of the Summary Jurisdiction Act, 1848, Section 4 of the Summary Jurisdiction (Married Women) Act, 1895, and Section 4 of the Summary Jurisdiction (Process) Act, 1881, against persons who are domiciled and ordinarily resident in Scotland. Bucknill L.J. left it open, however, whether mere presence or ordinary residence in Scotland was necessary to exclude the jurisdiction of English courts to serve a summons. The fact that in *Forsyth* v. *Forsyth* the husband was both domiciled and resident in Scotland at all relevant times and that it was left open whether ordinary residence in Scotland was necessary to exclude English jurisdiction there encouraged doubts which were put at rest by the Court of Appeal in *Macrae* v. *Macrae*[1] and by the Divisional Court in *Hamilton* v. *Hamilton*.[2]

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[1] (1949) Sc. L.T. 199.

[2] 12, 13 & 14 Geo. VI, c. 100.

[3] [1948] P. 256.

[4] [1948] P. 66.

[5] *International Law Quarterly*, 3 (1950), p. 246.

[6] *Modern Law Review*, 13 (1950), pp. 222, 228.

[7] [1948] P. 125; [1947] 2 All E.R. 623.

[8] 25 (1948), pp. 424–5.

In the former case husband and wife had lived together for three years in the house of the wife's parents in Manchester, where the husband had been working since his demobilization in 1945. The husband then refused to go on living there, gave up his work, left Manchester and returned to his parents in Scotland. The wife applied for and was granted a summons alleging desertion, which was served upon the husband in Scotland. Subsequently the justices made a maintenance order against him. The husband appealed on the ground that the justices in Manchester had no jurisdiction, seeing that he was resident in Scotland at the time when the summons was issued and when it was served. The Divisional Court (Lord Merriman P. and Hodson J.) allowed the appeal,[3] and the Court of Appeal upheld the decision of the Divisional Court.[1] It was common ground that the husband had severed his connexion with Manchester and had returned to Scotland and that his domicil of origin was Scottish, but there was no evidence to show whether he had or had not acquired a domicil of choice in England. Lord Merriman P. found that until he left Manchester the husband was ordinarily resident there, but that he was ordinarily resident in Scotland after he had left his wife. He held that in *Forsyth* v. *Forsyth* the husband was never personally present in England, and said:

> 'In my opinion, the only doubt which is created by *Forsyth* v. *Forsyth* is that raised by counsel's second argument, which is that the decision was based on Scottish domicile, as distinct from residence or ordinary residence.'

His Lordship examined the judgments of Bucknill and Tucker L.JJ. and continued:

> 'It is, therefore, a little difficult to know whether the decision was based on domicil or ordinary residence or both, but I think that the substance of the matter is that their Lordships were dealing with ordinary residence in Scotland, coupled, no doubt, with the fact that there was nothing to show that the husband had ever been in England. On those facts they held that there was no jurisdiction to issue a summons, and, therefore, no jurisdiction to serve it under the process provided by the Summary Jurisdiction (Process) Act, 1881.
>
> 'In my opinion, it is impossible to distinguish this case from *Forsyth* v. *Forsyth*. . . .'

In the Court of Appeal, Somervell L.J. quoted with approval the finding that the husband was ordinarily resident in Scotland and held that in these circumstances, on the authority of *Forsyth* v. *Forsyth*, the justices in Manchester had no jurisdiction. He thus confirmed the view expressed by the Divisional Court that the *ratio decidendi* of the latter decision was the existence of ordinary residence in Scotland. However, Somervell L.J. continued:

> 'Counsel for the husband raised a further argument. He submitted that the justices would have had no jurisdiction even though the presence of the husband in Scotland fell short of ordinary residence. . . . It is not clear to me, either in general principle, or, in particular, from the wording of s. 6 of the Act of 1881, which deals with the somewhat similar position in bastardy, that the court here would not have jurisdiction to deal with a case of this kind where the husband, though in Scotland, was there in circumstances which fell short of ordinary residence. Those points can be left to be dealt with if and when they arise.'

It remains thus a matter for speculation whether English courts can make maintenance orders against persons who, although physically outside the jurisdiction, have not acquired any ordinary residence in Scotland. If this view should prevail, jurisdiction to make maintenance orders would be, on the one hand, less restricted than jurisdiction in matrimonial matters affecting status. On the other hand, it would much exceed the normal jurisdiction of justices and would approximate to the jurisdiction exercised by English courts in matters of judicial separation or restitution of conjugal rights. See Dicey, *Conflict of Laws* (6th ed., 1949), Rule 34 (3), pp. 237-43. It may be doubted whether such a view is in accordance with Lord Watson's speech in *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517, 526, 527. See also *Armytage* v. *Armytage*, [1898] P. 178, 188; *Bavin* v. *Bavin*, [1939] 3 D.L.R. 328. In *Hamilton* v. *Hamilton*,[1] decided by the Divisional Court, the facts did not differ in any essential respect from those in *Macrae* v. *Macrae*. In these circumstances Lord Merriman P. found that the husband was ordinarily resident in Scotland and, following his interpretation of *Forsyth* v. *Forsyth* as set out in *Macrae* v. *Macrae*, held that English justices had no jurisdiction to make a maintenance order. For the purpose of defining ordinary residence his Lordship referred to the test developed for the purposes of Revenue law by the House of Lords in *Levene* v. *Commissioners of Inland Revenue*, [1928] A.C. 217, 232, and *Commissioners of Inland Revenue* v. *Lysaght*, [1928] A.C. 234, 243.

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[1] [1949] P. 397; 65 T.L.R. 547; [1949] 2 All E.R. 34; [1949] W.N. 250; [1949] L.J.R. 1671.

[2] [1949] W.N. 61.

[3] [1949] P. 272; [1949] L.J.R. 456; [1949] 1 All E.R. 290; [1949] W.N. 58; 93 Sol. J. 88; 113 J.P. 107.

No. 12. In *Harris* v. *Harris*[2] the husband appealed from an order of the Uxbridge Justices under the Maintenance Orders (Facilities for Enforcement) Act, 1920, confirming a maintenance order made by the Children's Court of Sydney, New South Wales, which also granted the custody of the child of the marriage to the mother. He contended, first, that the order of the New South Wales Court was not a maintenance order on the ground that it granted custody of the child of the marriage to the wife. Second, he alleged that he was entitled to raise grounds of objection against the original order even if these grounds differed from those which, according to the certificate from the New South Wales Court, might have been raised in the original proceedings. As a result, he contended, third, that the justices in England should have substituted an order in favour of the husband for the custody of the child and that they had no power to confirm a foreign order if the amount of maintenance allowed by the foreign court exceeded that which could be awarded in England.

1. As regards the nature of the provisional order made by the New South Wales Court, the Divisional Court (Lord Merriman P. and Barnard J.) examined the New South Wales Deserted Wives and Children Act, 1901, Section 7, as amended by Section 3 of the Deserted Wives and Children Amending Act, 1913, and found that the Order made by the New South Wales Court was in the nature of a maintenance order. Lord Merriman P. said:

> '. . . it is idle to speak of the Uxbridge justices having no jurisdiction to confirm the order in as much as it purported to contain a custody order. What they are confirming is a maintenance order, but it is a composite maintenance order. It specifies a sum of money directly payable to the wife as such and a further sum of money payable to her by way of allowance for the child because the custody of the child had been committed to her, and it is precisely because the custody of the child has been committed to her that in the words of the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 10, this child is a dependant whom the husband is liable to maintain according to the laws in force in New South Wales. Therefore, the sum awarded in respect of the child is properly called a maintenance order within the definition of the section.'

2. As regards the question whether the appellant could raise other grounds than those which had been certified by the court making the provisional order as grounds which might have been taken in the original proceedings, Lord Merriman P. referred to the judgment of Humphreys J. in *Re Wheat*, [1932] 2 K.B. 716, at p. 735, and said:

'At first sight it might be thought that the certificate from the court as to the grounds on which objection might have been taken are themselves exclusive, but it is clear on authority that they are not. The certificate is conclusive that objection might have been taken on certain grounds, but it is not exclusive of the possibility that other grounds of objection were open.'

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[1] [1949] W.N. 61; 93 Sol. J. 89.

[2] [1949] 2 All E.R. 318; [1949] W.N. 290; 93 Sol. J. 514.

It followed that the appellant could raise objections as regards the grant of the order for custody to the wife, seeing that this order was part of the composite maintenance order. He could also raise objections as to the amount of maintenance allowed by the New South Wales Court.

3. Turning to the merits of these two objections, Lord Merriman P. regarded the application to be granted the custody of the child of the marriage as misconceived, having regard to the facts of the case, the power both of the New South Wales Court and of the justices of England to reconsider the question of custody if the need arose and the practical difficulty of making a custody order in respect of a child who is out of the jurisdiction.

The fact that the New South Wales Order was made for an amount which exceeded that which could be awarded by a court of summary jurisdiction in England was irrelevant in view of the decision of the Court of Appeal in *Peagram* v. *Peagram*, [1926] 2 K.B. 165. The Court could hear objections raised by the husband even at this stage, but saw no reason to interfere with the provisional order. The husband was free at a later stage to apply either to the English justices under Section 4 of the Maintenance Orders (Facilities of Enforcement) Act, 1920, Section 4 (*b*) or to the New South Wales Court under Section 5 (5) of the corresponding New South Wales Act of 1923, for a variation or reduction if his financial position should have changed unfavourably.

Contracts

No. 13. *Boissevain* v. *Weil*[1] raised the interesting question to what extent the application of the ordinary rules of the conflict of laws in relation to a contract between an alien and a British subject can be modified by a British statute which purports to affect all British subjects, wherever they are. In June and July 1944 the defendant, who was resident in Monaco which was then under German occupation, borrowed £6,000 with 5 per cent. interest thereon from 9 June 1945 from the plaintiff, a Dutch subject, who also resided in Monaco. The defendant, who had no funds outside England, promised to repay the loan after the end of the war, or at any earlier date if her account in England should be released sooner. She gave the plaintiff a cheque for £2,000 which was blank as to the date, blank as to the payee and uncrossed, and informed both her bank in England and her English solicitors of the transaction. Upon the failure of the defendant to repay the loan, the plaintiff sued her in England. In the King's Bench Division[2] Croom-Johnson J. held that the contract was governed by Monegasque law, that it was not illegal at common law as involving trading with the enemy and was not prohibited by the Trading with the Enemy Act, 1939, Sections 2 (1) and 1 (2). He held, further, that the Defence (Finance) Regulations, 1939, Section 2, and the Emergency Powers (Defence) Act, 1939, Section 3, did not apply. Section 2 of the Defence (Finance) Regulations, 1939 (as amended in 1940), provided:

> 'Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall . . . buy or borrow any foreign currency or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.'

Section 3 (1) (*b*) of the Emergency Powers (Defence) Act, 1939 provided:

> 'Unless the contrary intention appears therefrom, any provisions contained in, or having effect under, any Defence Regulation shall . . . (*b*) in so far as they impose prohibitions, restrictions or obligations on persons apply (subject to the preceding

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[1] [1949] 1 K.B. 482; [1949] 1 All E.R. 146 (C.A.), affirmed [1950] 1 All E.R. 728 (H.L.).

[2] [1948] 1 All E.R. 893; 64 T.L.R. 293; [1948] W.N. 181.

> provisions of this subsection) to all persons in the United Kingdom and all persons on board any British ship or aircraft, not being a Dominion ship or aircraft, and to all other persons being British subjects except persons in any of the following countries or territories, that is to say, (i) a Dominion, (ii) India, Burma and Southern Rhodesia, (iii) any country or territory to which any provisions of this Act can be extended by Order in Council, and (iv) any other country or territory . . . under His Majesty's protection or suzerainty.'

He also held that the incomplete character of the cheque excluded the application of Section 3 C (1) of the Defence (Finance) Regulations, 1939.

Finally, if the claim was quasi-contractual, Croom-Johnson J. was prepared to apply English law, but in that case the plaintiff, not being subject to English law, was not *in pari delicto* with the defendant.

The Court of Appeal reversed the judgment of Croom-Johnson J. on the following grounds:

1. Both Tucker and Denning L.JJ. held that the Defence Regulations in question referred to 'any British subject wherever he may be, other than in one of the excepted territories, who buys or borrows foreign currency anywhere'. The regulations covered countries in foreign occupation and countries included under the Trading with the Enemy Act, 1939. Their Lordships were not impressed by the *argumentum ad absurdum* to the effect that the scope of the regulations, thus understood, rendered illegal all transactions, wherever concluded, of the kind envisaged by the regulation, by any British subject, even if he was domiciled abroad, unless the consent of the Treasury was previously obtained.

2. Nevertheless, the judgments both of Tucker and of Denning L.JJ. indicate that the reason for the application of the Defence Regulations is to be found not so much in the method of literal interpretation as in virtue of the application of the ordinary principles of the conflict of laws.

(i) Tucker L.J. attached some importance to the fact that England was the place of performance. Having referred to Lord Atkinson's speech in *Dynamit A.G.* v. *Rio Tinto Co. Ltd.*[1] and to *Santos* v. *Illidge*[2] he said:

> '. . . here not only is the contract prohibited by the law of this country, but its performance is to take place in this country. I do not think that in any shape or form the courts of this country will lend themselves to the enforcement, directly or indirectly, of the contract which was proved in the present case.'

(ii) Denning L.J. distinguished those possible cases which had been alleged to provide an *argumentum ad absurdum*, if all British subjects were held to be affected by the Defence Regulation in question. In his opinion these cases were of a different nature inasmuch as their proper law was not English with the result that the Defence Regulations did not apply. He said:

> 'It is said that it is unthinkable that a British subject long resident in, say, the United States, should not be able to buy or borrow dollars and pay for them with a cheque on his New York bank in dollars, or that a British prisoner of war should not be able to borrow foreign currency on which to live during his escape through enemy occupied territory. Those cases are, however, very different from the present case, because they do not involve the creation of any sterling credit. The proper law of the contracts in those cases is not English law. . . . If, however, he promises to repay in sterling in the United Kingdom, the proper law of the contract is the law of this country, and its validity depends on whether it is made illegal by the Defence Regulations. If it is illegal by the law of England, it is, or should be, invalid everywhere. In construing the Defence Regulations, it must be assumed that, in so far as they have extra-territorial effect on the validity of contract, they apply only to con-

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[1] [1918] A.C. 292, at p. 299.

[2] (1860), 8 C.B. (N.S.) 861.

tracts of which the proper law is the law of England, for those are the only contracts whose validity they can affect, and not to contracts of which the proper law is the law of some other country the validity of which they do not affect.'

Some of these passages suggest the conclusion that the decisive fact was that England was the place of performance, whether for the purpose of determining the proper law or in view of the rule in *Ralli Brothers* v. *Compania Naviera Sota y Aznar*.[1] However, any doubts in this direction were dispelled by Denning L.J. himself when he suggested the following tests for ascertaining the proper law of the contract in these words:

> 'In the present case, the proper law of the contract is English law. Having regard to the nationality and domicil of the defendant, to the detailed arrangements for the repayment of the loan in London, and to the circumstances which gave rise to the transaction, there can be no doubt that England was the country with which the transaction was most essentially connected, and that, therefore, English law was the proper law. The only connexion with Monaco was that it happened to have been effected there.'

3. Both Croom-Johnson J. in the King's Bench Division and the Court of Appeal discussed briefly whether the plaintiff's claim was well founded as an action for money had and received. The Court of Appeal was of the opinion that no quasi-contractual claim for money had and received could be brought in the circumstances, on the ground, it would appear, that English law, and thus also the Defence Regulations, applied to the quasi-contractual claim. It is not possible, however, to state with precision whether the result was reached on the basis of the first reason given by the Court of Appeal to the effect that the Defence Regulations applied to all British subjects or of the second reason, viz. that English law applied according to the English rules of the conflict of laws.

No. 14. Actions for breach of promise are rare in private international law. They may raise not only a difficult question of choice of law, but they provide also a fertile ground for nice distinctions of classification. Breach of promise is actionable in most countries, but the remedy is sometimes in contract, sometimes in tort, and sometimes it exists by operation of law, or it is treated as arising out of a contract *sui generis* similar to the contract of marriage itself (Rabel, *Conflict of Laws*, vol. i, pp. 199 ff.; cf. Robertson, *Characterization in the Conflict of Laws*, pp. 76, 78, 177). In *Kremezi* v. *Ridgway*,[2] the plaintiff, a Greek girl, and the defendant, a British naval officer, domiciled in England, had exchanged mutual promises of marriage in Athens. These promises were renewed upon the plaintiff's arrival in England. The marriage ceremony was to take place in Athens, but the matrimonial home was to be established in England. The defendant subsequently failed to carry out his promise, and the plaintiff sued him for breach of promise. Upon the evidence before the court, Hilbery J. had no doubt that according to Greek law a claim for breach of promise was of a contractual nature. Similarly, he held that the claim was contractual according to English law, seeing that English law regards mutuality of promises as essential for the formation of a contract. That classification is clearly correct, irrespective of whether it was intended to refer, in the circumstances, to the nature of an action for breach of promise in English law (*Harrison* v. *Cage* (1699), 1 Ld. Raym. 386) or to the enlarged meaning of the term 'contract' in English private international law (*Re Bonacina*, [1912] 2 Ch. 394).

The question, therefore, resolved itself into one of choice of law, i.e. what law governed the engagement to marry and the subsequent breach of that agreement. Relying on *Hansen* v. *Dixon* (1906), 23 T.L.R. 56; 96 L.T. 32, Hilbery J. applied the principles of private international law applicable to ordinary commercial contracts where the parties have not made an express choice of law. He cited *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202, where the House of Lords weighed the arguments in the particular case, in favour of the *lex loci contractus* and the *lex loci solutionis*, and held that the parties must have intended English law to apply to the engagement to marry, partly for the reason that the promise had been reaffirmed in England, but mainly on the ground that the matrimonial home was to be in England. He disregarded the fact that the original engagement was entered into in Greece and that the marriage ceremony was to take place in Greece. In effect, he treated the engagement to marry as an ordinary commercial contract and regarded the place of the intended matrimonial home as the place of performance to the exclusion of the place where the marriage ceremony was to be performed. Against this view objections have been raised[1] on the ground that 'the engagement to marry is legally performed when a valid ceremony has taken place, and the legal obligations between the parties thereafter no longer rest on contract, but purely on the status conferred on them by law as a result of a valid ceremony'. It cannot be denied that there is substance in this objection (see Brett L.J. in *Niboyet* v. *Niboyet* (1878), 4 P.D. 1, 11), once it is admitted that the place of the intended matrimonial home is irrelevant, not only for determining capacity to marry[2] but also in respect of the validity of the contract to marry as a whole. However, this negative conclusion does not provide an answer to the question which was before the court, i.e. what law governs an engagement to marry. If the law of the place where the matrimonial home is to be set up must be disregarded, attention naturally becomes centred upon the law of the place where the marriage is to be performed. But the selection of the place where the marriage is to be celebrated is often accidental, and undue importance should not be attached to this test. The same consideration applies to the possible choice of the law of the place where the engagement to marry was concluded. For in contracts which normally require the presence in person of the contracting parties the selection of the meeting-place is primarily determined by considerations of convenience and with complete disregard to the possible application of the *lex loci contractus*. In this respect contracts to marry differ from ordinary commercial contracts where the selection of the place of performance is never without legal significance, while the selection of the place of contracting in contracts *inter absentes* and *inter praesentes* is usually determined by the centre of business of one of the parties.

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[1] [1920] 2 K.B. 287.

[2] [1949] 1 All E.R. 662; 93 Sol. J. 287.

It will have to be considered, therefore, whether the contract to marry is *sui generis*, notwithstanding that the remedy in English domestic law is conceived in terms derived from the law of contract. If it should be regarded as a contract 'pertaining to the field of family relations' (Rabel, op. cit.), it may be that the engagement to marry is not governed by one legal system to the exclusion of all others, but that the obligations of each party are governed by his or her personal law. Such a result would not be altogether out of step with the development initiated by the Court of Appeal in *Sottomayor* v. *De Barros*, (1877) 3 P.D. 1, and terminating in the decision in *Re Paine*, [1940] Ch. 46.[3]

It has been said, further, that the decision in the case under review shows a certain inconsistency as regards the significance attached to the difference in the measure of damages for breach of promise according to English and Greek law.[4] Hilbery J. first justified the need for a choice between English and Greek law by reference to the difference in the measure of damages in these two legal systems. Subsequently, having found that English law applied, he held that the measure of damages was always governed by the *lex fori*, i.e. English law. If the law is that the measure of damage is a procedural matter, and therefore governed by the *lex fori*, this criticism of the process of reasoning employed by Hilbery J. is well founded, but the result is correct. If the law is that the measure of damages is not necessarily a procedural matter, he was right in attempting to determine the law governing the engagement to marry, and having found that English law applied, in determining the measure of damages according to English law. But English law would then have applied as the *lex causae* and not as the *lex fori*. There is little authority on this question. Generally speaking there is agreement that the measure of damages is determined by the *lex fori*. However, it has been suggested that in matters of contract the question of remoteness of damage, as distinct from the technical process of assessing damages, should be governed by the proper law of the contract.[1] In the present case English law applied whatever view was adopted, but cases may well arise where the problem looms large, especially if the suggestion made here should be correct to the effect that in engagements to marry the liabilities of the parties may be governed by two different systems of law.

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[1] Prof. Graveson in *The Conveyancer, N.S.*, 13 (1949), p. 299.

[2] But see Cheshire, *Private International Law* (3rd ed., 1947), pp. 266 ff.

[3] Cf. also Rabel, *Conflict of Laws*, vol. i, pp. 199 ff.; Miele in *Giurisprudenza Comparata di diritto internazionale privato*, 8 (1942), p. 77.

[4] For the latter, prior to the introduction of the new Civil Code, see Rabel, *Conflict of Laws*, vol. i, p. 203, Note 17.

No. 15. The decision of Cassels J. in *Frankman* v. *Anglo-Prague Credit Bank*[2] was noted in the previous volume of this *Year Book*,[3] where the facts were set out in full. Briefly, the plaintiff as personal representative sued on a contract entered into by the deceased, Mrs. Frankman, with the head office in Czechoslovakia of the defendant bank. Under this contract the defendants as bailees held a number of debentures for the deceased in the custody of their branch office in London. The contract provided *inter alia* in Condition 11:

> 'As regards such stocks and securities as were purchased at a stock exchange other than that of Prague or were received by any bank other than a Prague bank, we shall not have the same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will leave the same, at the risk and expense of the customer, deposited with our correspondent, where they shall be subject to the law of the respective country [the country where they are deposited]. . . .'

Condition 50 provided:

> 'The place of performance and payment in respect of all obligations resulting from the business connection with us shall be considered to be the place of that department of our establishment which has carried out the relevant transaction with the customer, except in so far, however, as any special stipulation has been made in this connection.'

The defendants, who were the London branch office of the Anglo-Prague bank, contended that the contract was governed by Czech law; alternatively they alleged that, irrespectively of what law governed the contract, the place of performance was in Czechoslovakia. For the purposes of Czech law, the defendant bank was an exchange citizen and the deceased, at the time when the contract was concluded in 1938, was also an exchange citizen. She became an exchange foreigner when she left Czechoslovakia in 1939. According to Czech law the performance of contracts between exchange citizens and exchange foreigners is illegal unless the consent of the National Bank of Czechoslovakia has been obtained. This consent was withheld. Cassels J. found that Czechoslovakia was the place of performance and that, in view of the fact that performance was illegal under Czech law as the *lex loci solutionis*, the claim could not be enforced in England. The fiscal character of the Czech exchange legislation prohibiting the transfer of the debentures without the consent of the Czech National Bank did not render this legislation inapplicable in England on the ground of public policy, having regard to Article VIII (2) (*b*) of the International Monetary Funds Agreement which had the force of law in England under the Bretton Woods Agreements Order in Council 1946 (*S.R. & O.*, 1946,

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[1] Cheshire, *Private International Law* (3rd ed., 1947), p. 850; Dicey, *Conflict of Laws* (6th ed., 1949), p. 862 and Note 12; Wolff, *Private International Law* (1945), s. 226; *Livesley* v. *Horst*, [1924] S.C.R. 605; [1925] 1 D.L.R. 159 with references to earlier authorities. In *Hansen* v. *Dixon* (1906), 23 T.L.R. 56, Bray J. based his rejection of Danish law which, according to the evidence, allowed actions for breach of promise only in certain circumstances, on the ground that it only concerned the remedy. This view is difficult to accept.

[2] [1948] 1 K.B. 730; [1948] W.N. 73; [1948] 1 All E.R. 337.

[3] 25 (1948), pp. 432-4.

No. 36). The Court of Appeal reversed this decision, but the House of Lords restored the judgment of Cassels J.

In the Court of Appeal,[1] Lord Goddard L.C.J. held that the contract was governed by English law, at least in so far as it related to the duty of the bailee to return the debentures. He relied on Conditions 11 and 50 of the contract between the deceased and the Anglo-Prague Bank. After summing up Condition 11, Lord Goddard continued:

> 'How does that work in with Condition 50? . . . So far as safe custody of the shares is concerned, this is being carried out by the branch in London. . . . her shares were in London because the bank stipulated that they should be left there unless she gave special orders to the contrary. Those shares were to be held in London according to the laws of England. Therefore, any consideration of what is the proper law of the contract is provided by the condition itself and the proper law of the country is the law of England and not the law of Czechoslovakia. . . .'

Asquith L.J. concurred, but rested his judgment on general principles of private international law. He said:

> 'Two conclusions, among others, seem to me to result from that application—first, that the contract entered into between Mrs. Frankman and the bank in 1938 was governed by Czechoslovak law, the *lex loci contractus*, but, secondly, that, if and so far as, construed by that law, the contract provided for obligations to be performed in England, such obligations were intended to be governed by, and should be treated by English courts as governed by, the municipal law of this country, the *lex loci solutionis*. Such obligations are, accordingly, not affected by Czech domestic legislation. . . . That being so, the appeal turns mainly on whether the material obligations were to be performed in Czechoslovakia or in England.'

He found that the obligations of the defendants consisted in the duty to keep the debentures in safe custody, to re-deliver them to the owner on demand and to carry out these duties in accordance with the contract made with the deceased. Since the defendant bank had not exercised its right under the contract to transfer the debentures to Prague, but had retained them in their branch office in England, as they were entitled to do, 'the depositor, who was at the material time in England, could validly assert his right to re-delivery by a demand addressed to the defendants' London branch where the bonds were, instead of resorting to the circuity of addressing such a demand to the Prague branch where they were not'.

The House of Lords[2] reversed this decision. Their Lordships held, alternatively, that the entire contract was governed by Czech law or that it was exclusively to be performed in Czechoslovakia with the result that Czech law applied as the *lex loci solutionis*.

In the opinion of Lord Simonds, the conditions showed that Czech law was both the proper law of the entire contract and the *lex loci solutionis* of the contract as a whole. Turning to the interpretation of Conditions 11 and 50 by the Court of Appeal, he said:

> 'I do not read the provision as affecting the legal rights or obligations of the parties except so far as may be necessary for the protection of the bank. It might be laid to their charge that they had not taken due care of securities left in their custody, if, being deposited with a correspondent in another country, they became subject to some penal or confiscatory measure. It is, I think, to avoid the possibility of such a liability that the bank makes this provision.'

It followed that

> 'The fulfilment of the contract therefore involves the doing of an act in Czechoslovakia viz.: either the actual delivery of the securities or the giving of an authority for their delivery, which is by the law of Czechoslovakia, itself the law of the contract, illegal. It is, I think, clear that the courts of this country will not enforce such per-

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[1] [1949] 1 K.B. 199; [1948] W.N. 440; [1948] 2 All E.R. 1025.

[2] [1950] A.C. 57; [1949] 2 All E.R. 671; [1949] W.N. 392.

formance: see *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287, and contrast *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie A/G*, [1939] 2 K.B. 678.'

Lord Normand, Lord MacDermott, and Lord Reid read judgments to the same effect. Lord Radcliffe held that the proper law of the contract was Czech, even if the *lex loci solutionis* should be English. As regards the question whether the enforcement of Czech currency legislation was contrary to English public policy, Lord Simonds approved the view of Cassels J. to the effect that such legislation was within the purview of the Bretton Woods Agreements, which had become part of the law of England.

However unsatisfactory the result, it is difficult to see how it could be avoided, unless the view of the Court of Appeal had been accepted to the effect that English law was the proper law of the contract. The result is unsatisfactory, not because Czech rather than English law applied, but because English courts had to enforce Czech currency legislation. In view of the Bretton Woods Agreements, which had been incorporated into English law, this was inevitable, but it may be asked whether the particular case in question fell under the operation of the Agreements. It may be asked whether the recovery of property from bailees outside the country the currency legislation of which purports to apply is covered by the Agreements, or whether these Agreements envisage only claims for the performance of obligations and for the transfer of property by a currency citizen to a currency foreigner, if the contract is to be performed or the property is to be transferred within the country (e.g. Czechoslovakia) the legislation of which prohibits such a transaction.

No. 16. The decision of the Court of Appeal in *Kahler* v. *Midland Bank Ltd.*[1] was noted in the previous volume of this *Year Book*[2] in connexion with the report of the judgment of Cassels J. in *Frankman* v. *Anglo-Prague Credit Bank*, the subsequent stages of which were discussed above (Case No. 15). *Kahler*'s case differed from *Frankman*'s case only inasmuch as the plaintiff was the original owner of the shares and the defendants stood in no contractual relations with the plaintiff. They held as bailees from a Czech bank with which the shares had been deposited by the plaintiff. A further complication arose out of the fact that the plaintiff had originally deposited the shares with another Czech bank, but had been forced to transfer the deposit to the defendants' bailors under a contract which was void on the ground of duress. However, it was found as a fact that the plaintiff had ratified this contract in the course of the pleadings ([1950] A.C., pp. 27, 34, 46, 49). In the absence of any privity of contract between the plaintiff and the defendants, the action proceeded in detinue. The defendants disputed the right of the plaintiff to immediate possession, seeing that they held as bailees from the Czech bank, and that the plaintiff, under his contract of deposit with the Czech bank, was precluded from obtaining the shares in the absence of consent on the part of the Czech National Bank as required by the Czech exchange legislation. The question was, therefore, what law governed the contract between the plaintiff and the Czech bank, who were the defendants' bailors. In the House of Lords,[3] a majority (Lord Simonds, Lord Normand, and Lord Radcliffe) held that the proper law of the contract was Czech and that the nature of the Czech exchange legislation was not penal so as to exclude its application in England. In the absence of the requisite consent of the Czech National Bank, the plaintiff was thus not entitled to immediate possession and the action failed. Lord MacDermott and Lord Reid, in dissenting judgments, held that the notional contract, as established by the pleadings, with the defendants' bailors must be presumed to be governed by English law according to the intention of the parties (at pp. 39, 41, 42, 51) and that, therefore, the Czech exchange legislation did not apply. In their view the plaintiff was entitled to succeed.

[1] [1948] 1 All E.R. 811 (C.A.).

[2] 25 (1948), p. 434.

[3] [1950] A.C. 24; [1949] 2 All E.R. 621; 65 T.L.R. 663; [1949] W.N. 390 (H.L.).

The decision has been the object of some critical comments.[1] Here the following observations must suffice.

In the first place, the decision was reached by a cumulation of fictions. The court assumed, on the basis of the pleadings, that the plaintiff had ratified the contract with the Czech bank which had been made under duress. Then, it ascertained the presumed intention of the parties as to what law should govern the contract which had been ratified by the plaintiff. As regards ratification, it is difficult to see the reasons of the plaintiff for so doing, unless he wished thereby to strengthen his claim by showing an immediate contractual right to possess. If this was his intention it is difficult not to adopt the dissenting view of Lord MacDermott and Lord Reid that, at least the plaintiff, at that time, intended that English law should apply. On the other hand, if the plaintiff had not been regarded as having ratified the contract, it could still have been argued, although with doubtful justification, that a quasi-contractual relationship had arisen between him and the Czech bank which must be governed by Czech law.

In the second place, it must be noted that the action, as brought in England, proceeded in tort, and the question of the immediate right to possess was raised at once. If the action had been brought in Czechoslovakia, it would have proceeded as an action of a proprietary nature to recover property, and the existence of a contract of bailment would have been irrelevant. Nevertheless, Czech legislation would have applied, but as a part of Czech public law, and not in virtue of the (irrelevant) contract. Conversely, the conclusion of a contract of bailment to be governed by English law would have been insufficient to exclude the operation of the Czech exchange legislation.

It may thus be doubted whether the fact that, in the view of the majority of the House of Lords, the contract of bailment was governed by Czech law, leads necessarily to the conclusion that the Czech exchange legislation must be applied by English courts. The immediate right to possession required to support an action in detinue in England in respect of movables in England would appear to be a right allowed by private law, whether English or foreign, but it may be suggested that it is irrelevant whether this right has been affected by foreign legislation of a fiscal or cognate character which purports to suspend, curtail, or destroy the right in question.

Succession. Foreign Executors. Probate

No. 17. Problems of characterization do not arise as frequently as the copious literature on this subject may suggest, and when they arise, it is not always easy to obtain guidance either from the literature or from decided cases. The reason is, of course, that a question of characterization cannot be put or answered in the abstract, but involves always the interpretation of some individual rule of a particular legal system in the light of one or several individual rules of the conflict of laws of the *lex fori*. *In the Estate of Goenaga*[2] raised a question of characterization which is well known in practice but for which neither theory nor practice offered a precedent which was on all fours with the facts before the court.[3]

The testator, who died domiciled in France leaving a widow and seven children, made a will which was valid in form according to English private international law, whereby he disposed of his property in England and appointed the plaintiff executor. More than one year after the testator's death the plaintiff applied for probate in England. According to expert evidence, the powers of an executor under French law cease after a year and a day from the date of the testator's death in virtue of article 1026 of the Code Civil. Thus if English law applied, the plaintiff was entitled to probate; if French law applied, the heir or the *légataire universel* was seised of the estate in virtue of Articles 1004, 1006,

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[1] P. B. Carter in *International Law Quarterly*, 3 (1950), pp. 255–9; F. A. Mann in *Modern Law Review*, 13 (1950), pp. 206–12.

[2] [1949] P. 367; [1948] W.N. 463; 93 Sol J. 28.

[3] But see *In the Estate of Levy*, [1908] P. 108; *Meatyard*, [1903] P. 125; *Cocquerel*, [1918] P. 4; *Humphries*, [1934] P. 78.

1008 of the Code Civil and entitled to letters of administration with the will annexed. English law, being the *lex fori*, governed the administration of the property of the deceased in England.[1] French law, being the law of the domicil of the testator at the time of his death, governed the distribution of the movables of the deceased.[2] Ormerod J. allowed the motion of the plaintiff and applied English law without indicating the grounds for his decision.

It has been observed by Mr. Morris[3] that the decision of Ormerod J., however desirable, cannot be reconciled with *Anderson* v. *Laneuville*,[4] where in seemingly identical circumstances the Court of Probate applied French law and granted letters of administration to the *légataire universel*. Giving judgment, Sir C. Creswell said (at p. 45): 'The right in England of an executor to whom probate has been granted by any English court must be regulated by English law, but the meaning and effect of the appointment of an *exécuteur testamentaire* in such a will as that made in France by a domiciled Frenchman is a question of French law.'

It is submitted here that the decision of Ormerod J. was correct both on the facts and according to law for the following reasons:

1. In French law, the appointment of personal representatives is not compulsory, but a testator has the choice of appointing either an *exécuteur testamentaire* without seisin, whose material powers are very restricted but whose appointment is not limited in time, or an *exécuteur testamentaire* with seisin whose appointment (which must be express) comes to an end after a year and a day. It is a matter of construction whether the testator intended to appoint an executor of the first or of the second kind.

2. It is not unusual for testators who own property in several countries to make separate wills, each of which disposes of the assets in one country only. Although the distribution of the movable assets disposed by separate wills is governed by one and the same law, which is the law of the last domicil of the testator, the construction of these separate wills may be governed by different systems of law, especially if technical terms are used which bear a special connotation according to the law of the country where the assets forming the object of the separate will are situated.[5]

3. The court in *Anderson* v. *Laneuville* applied French law to determine the position of the executor, not because French law governed the distribution of the estate, but because, in the absence of any indications to the contrary in the will, French law, being the law of the testator's domicil, governed the construction of the will.[6] This explanation is borne out by the words of Sir C. Creswell, when he said: 'but the *meaning* and effect of the appointment of an *exécuteur testamentaire* in such a will as that made in France by a domiciled Frenchman is a question of French law'. In *Anderson* v. *Laneuville* this conclusion was fully justified, seeing that the testator, being domiciled in France, made a will there in French form whereby he disposed of all his property in France and elsewhere. In *Goenaga*'s case, the testator was also domiciled in France, but he made an English will disposing of his property in England and the British Empire. If technical terms of English law were used, there was thus sufficient reason to construe the will, including the appointment of an executor, according to English law.

4. It appears, therefore, that a question of interpretation arises in this case at two different levels. In the first place, it is necessary to interpret the will in order to ascertain whether the testator intended it to be construed according to English law or according to the law of his last domicil, France. In the second place, if French law applied, it was necessary to determine whether the testator intended to appoint an *exécuteur testamentaire* without seisin but unlimited in time, or with seisin, limited by law to one year and a day. There is some reason for assuming that the expert evidence led by the plaintiff confused

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[1] Dicey, *Conflict of Laws* (6th ed., 1949), Rule 176.

[2] Ibid., Rule 177.

[3] *International Law Quarterly*, 3 (1950), p. 243.

[4] (1860), 2 Sw. & Tr. 24. See also the cases cited above, p. 488, n. 3.

[5] Dicey, op. cit., Rule 183, Exception.

[6] Dicey, op. cit., Rule 183.

these two stages of interpretation and assumed from the use of the technical term 'executor' as known in English law that the testator wished to appoint expressly an *exécuteur testamentaire* with seisin as envisaged by article 1026 of the French Code Civil.

5. Assuming that the testator wished to have his will construed according to English law and employed the term 'executor' in the sense known in English law, the question remains whether he could lawfully do so, having regard to the restrictive provisions of French law which governed the distribution of the movables. It appears that if a testator domiciled abroad appoints executors and wishes to give them the powers of English executors, the English court will grant probate conferring upon them the full powers of English executors.[1] If the testator does not wish to give them such extensive powers, or if he appoints as his English executors the persons who are executors of all his property and who under the law of his last domicil enjoy powers which are more restricted than those granted by English law, the English court will grant letters of administration with the will annexed as near as possible to the powers granted in the will.[2]

The extent of the powers would thus appear to be governed by English law, unless the will is to be construed according to foreign law or the testator has curtailed the powers expressly or implicitly. The fact that the law governing the distribution of the assets curtails the powers of the personal representatives would appear to be irrelevant. The court is, of course, free to grant probate to the executor appointed by a second foreign will, especially if the latter purports to revoke a previous English will: *In the Goods of Meatyard*.[3] This case was distinguished in the case of *In the Goods of Cocquerel*,[4] where no appointment had been made as yet by the court of the foreign domicil of the testator.

This solution is reasonable, if it is remembered that French law discourages the appointment of executors on the ground that their appointment is a hostile act directed against the heirs or universal legatees, treats executors as mandatories, and excludes executors by representation (article 1032).

The conflict, in the present case, is therefore between the characterization of the question as one of administration or of construction, but not of administration or distribution.

Jurisdiction—Assumed Jurisdiction under Order XI

No. 18. In *Tyne Improvement Commissioners* v. *Armement Anversois Société Anonyme, The Brabo*,[5] the House of Lords was called upon to interpret Order XI, rule 1 (*g*) of the Rules of the Supreme Court. The plaintiffs, a conservancy authority, brought an action under various Tyne Improvement Acts, especially the Tyne Improvement Act, 1890, Section 42 and Section 3, to recover expenses for clearing the wreckage of the *Brabo*, against a shipping company as owners of the ship (the first defendants), against the Minister of Supply as owner, on behalf of the Crown, of the cargo (the second defendant), and the British Iron and Steel Corporation as agents of the cargo owners (the third defendants). On learning subsequently that the first defendants were a Belgian company carrying on business in Belgium, the plaintiffs applied *ex parte* for leave to serve notice of the writ out of the jurisdiction under R.S.C. Order XI, rule 1 (*g*). Pilcher J. granted leave and rejected an application of the first defendants to set the order aside. The Court of Appeal[6] reversed this decision on the ground that since the second and third defendants in England were not responsible in law to the conservancy authority the action was not 'properly brought' against them in the meaning of Order XI, rule 1 (*g*) so as to justify service of notice of the writ upon the first defendants in Belgium. The House of Lords upheld the decision of the Court of Appeal.

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[1] Tristram and Coote, *Probate Practice* (19th ed., 1946), p. 72.

[2] Ibid.; *In b. Earl* (1867), 1 P. & D. 175; *In b. Briesemann*, [1894] P. 260; *In b. Von Linden*, [1896] P. 148; *In b. Levy*, [1908] P. 108; *In b. Grewe* (1922), 127 L.T. 371; Dicey, p. 452, Note 89.

[3] [1903] P. 125, 129.

[4] [1918] P. 4.

[5] [1949] A.C. 326; [1949] L.J.R. 435; 65 L.T.R. 114; [1949] 1 All E.R. 294.

[6] [1948] P. 33; [1947] 2 All E.R. 363.

Order XI, rule 1 (*g*) of the Rules of the Supreme Court provided: 'Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a Judge whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.'

The question before the Court was whether in the circumstances leave to serve notice of the writ was admissible in law. Alternatively, the question was whether the discretion of the Court in granting leave was to be exercised in the present case. In the opinion of the House of Lords, although the Minister of Supply could be sued under the War Department Stores Act, 1867, Section 20, the Ministry of Supply Act, 1939, Section 2 (3) and the Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (*S.R. & O.*, 1939, No. 877), these Acts preserved the privileges and prerogatives of the Crown. Since the various Tyne Improvement Acts preserved the privileges of the Crown throughout, it followed that the Minister and the Agents could be sued without the necessity of a petition of right, but that they were not debarred from the protection which in the particular case the Crown itself would have enjoyed. The question was, therefore, whether the first defendants in Belgium were a necessary or proper party to an action properly brought against the second and third defendants in England, if the latter could be sued, but if it was reasonably clear as a matter of law that an action against them must fail on the ground that they were not indebted to the plaintiff, if they availed themselves of the defences open to them. The plaintiffs contended that it was sufficient if the action was brought bona fide and that it was irrelevant whether it stood a chance of success. Alternatively, if the possibility of success or failure was relevant, the objective possibility of success was to be disregarded and only the knowledge of facts available to the plaintiff at the time when the summons was issued was to be taken into account.

Their Lordships rejected these contentions and were of the opinion that leave to serve notice of the writ out of the jurisdiction could not be given. Lord Simonds, Lord Du Parcq, and Lord Normand held so as a matter of law on the ground that the action was not 'properly' brought in the sense of Order XI, rule 1 (*g*). Lord Porter and Lord MacDermott came to the same conclusion on the alternative ground that in the circumstances the exercise of the discretion of the court to grant leave to serve notice of the writ abroad was not warranted.

As regards the contentions of the plaintiffs Lord Porter (see also the speech of Lord Simonds) said:

> 'If the *bona fides* of the applicant were the only test, then the less competent the advice he received and the less his capacity of judging accurately for himself, the greater would be his opportunity of obtaining leave to serve a writ out of the jurisdiction, and, if his knowledge at the date of the issue of a summons for leave is the vital question, then the greater his ignorance, the better his chances of success. Both these considerations, in my view, point to the fact that neither *bona fides* nor personal knowledge is the true criterion. Some chance of success, at least, seems to be necessary, and a knowledge of the true facts, so far as ascertainable, must, I think, be required. The tribunal should not be confined to a consideration of the facts as known to one party only, whether at the date of the issue of the summons or at the time when it was heard. The criterion must be objective, not subjective.'

Lord Simonds expressed himself in the same sense and distinguished the judgment of Lindley L.J. in *Witted* v. *Galbraith*.[1] Turning to the criterion which must be applied to determine whether there is an objective possibility of success, if the facts or the law upon which the liability of the party within the jurisdiction depends are in dispute, Lord Porter said:

> '. . . the right to add the foreigner should be sparingly used, more particularly in

[1] [1893] 1 Q.B. 577, 579.

> a case where the party within the jurisdiction may not be subject to any liability, and, therefore, the action would fail as against the only person or persons who could be sued here were it not for the rule. In theory this objection has as great force where the law is in dispute as it has where the facts in respect of which liability is asserted are in issue, inasmuch as the defendant within the jurisdiction may in either case be held to be blameless, but in practice the position differs, since the latter involves what may be a long and complicated consideration of the weight of evidence after the examination of a larger or smaller number of witnesses, whereas the former, if, as in the present case, the facts are ascertained, can often be decided as well at the hearing of a summons as it can in a formal trial.'
>
> After reviewing the authorities he continued:
>
> 'One may say generally that serious disputes of fact cannot as a rule be decided on a summons, whereas questions of law can, except, perhaps, in exceptional and complicated cases. Ultimately, I think that the granting or withholding of leave must be a matter of discretion. . . .'

In the case before the House of Lords, however, no disputed questions of law arose. As regards the exercise of the discretion of the court, provided the action had been 'properly brought', Lord Simonds observed:

> '. . . there still remains the question how, assuming the action to be properly brought, the discretionary jurisdiction should be exercised. The two questions will often be found to interlock. For instance, if it were the true view that an action is properly brought if the plaintiff brings it *bona fide* and there is a "plausible cause of action" or "a real issue" to be tried, yet the court may and, as I think, should as a rule allow the defendant out of the jurisdiction to try to show that the case against the defendants must fail and, if he succeeds in doing so, then [at] its discretion set aside the order of service.'

Lord Simonds rejected the conclusion of the plaintiffs that only the knowledge of facts available to the plaintiff at the time when the summons was issued was to be taken into account. He acknowledged that it was not always easy or necessary to decide at this early stage of the proceedings whether the action was well founded, and therefore properly brought, and said:

> '. . . I would say at least negatively that, where the defendant out of the jurisdiction does take on himself that burden, the court should not easily be deterred by any apparent difficulty or complexity of subject-matter from considering, and, if it can do so at that stage, forming an opinion on, the question whether the action is bound to fail against the defendants within the jurisdiction. If, having done so, the court answers that question in the affirmative, then it must conclude that the action is not "properly brought".'

He held that the criterion applied by Morton J. (as he then was) in *Ellinger* v. *Guinness, Mahon & Co.*[1] to the effect that the condition of Order XI, rule 1 (*g*) was satisfied if there was a real issue to be tried was too wide, although Lord Du Parcq and Lord MacDermott were prepared to accept it as substantially correct.

As regards the liability of the second and third defendants, Lord Porter and Lord Du Parcq were satisfied that no liability existed, seeing that the Crown could not owe a debt under the terms of the relevant statutes. Lord Simonds and Lord MacDermott held that the action against them was not properly brought against them for the reason alone that the action could not succeed if the second and third defendants raised the defence of immunity.[2]

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[1] [1939] 4 All E.R. 16.

[2] For comments see Mann in *Modern Law Review*, 12 (1949), pp. 382–4.

Jurisdiction to Stay Actions

No. 19. Petitions to restrain foreign proceedings on the ground that their continuation would be oppressive or vexatious seeing that an action is pending in England are rare. In *Orr Lewis* v. *Orr Lewis*[1] the wife petitioned for a divorce in England on the ground of cruelty, and the husband started proceedings in France for the dissolution of the marriage on the ground that his wife had deserted him. In the English proceedings a stage had been reached where the Court of Appeal had decided that the wife was domiciled in England and that English courts had jurisdiction. The petitioning wife, however, failed to have the case set down for trial although more than three months had passed since the Court of Appeal had given judgment. The husband, on the other hand, refused to accept the jurisdiction of the courts in England and continued the proceedings in France, but there was no evidence before the English court that any immediate steps were being contemplated in the French proceedings.

Upon the petition of the wife for an injunction restraining the husband, perpetually or until the wife had obtained a decree in England, from pursuing his proceedings in France, Willmer J. refused the injunction on the ground that the wife had not shown that the prosecution of the proceedings in France would be oppressive or vexatious. While recognizing that he had jurisdiction to make the order, he adopted as his own the words of Scrutton L.J. in *Cohen* v. *Rothfield*[2] that 'as the effect is to interfere with proceedings in another jurisdiction, the power should be exercised with great caution to avoid even the appearance of undue interference with another court'. He also followed the distinction drawn by Scrutton L.J. in the same case between cases where it is sought to restrain the same plaintiff suing in two jurisdictions and those cases where the plaintiff in one country is the defendant in another. In the latter type of case, as Scrutton L.J. pointed out, courts in England will be even more reluctant to interfere than in the former, seeing that the plaintiff who is to be restrained has only initiated one action while, as the defendant in the other, he has no control over the latter.

For reasons of space this section does not include cases bearing on private international law decided by courts in Scotland. Attention may, however, be drawn to the following: (1) *Antanina Anskaitis or Labacianskas, Petr.*, (1949) Sc. L.T. 199 (domicil, dissolution of marriage in connexion with a declaration of presumption of death); (2) *Perrin* v. *Perrin*, (1950) Sc. L.T. 51 (recognition of foreign divorces); (3) *McElroy* v. *McAllister*, [1949] S.C. 110; (1949) Sc. L.T. 139 (foreign tort); and (4) *Chisholm* v. *Chisholm*, (1949) 50 Sc. L.T. 394 (formalities of wills of movables).

K. Lipstein

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[1] [1949] P. 347; [1949] 1 All E.R. 504; [1949] W.N. 93; [1949] L.J.R. 682.

[2] [1919] 1 K.B. 410, 413.

DOCUMENTARY SECTION
(FOURTH YEAR)

CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS

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INTRODUCTORY NOTE

As the publication in this section of the *Year Book* of the constitutions of the principal international organizations proceeds, it will become possible to give space to texts other than constituent instruments of independent organizations. In particular, it may be desirable to reproduce constitutions of bodies created by organs of the United Nations other than the specialized agencies. Thus the setting up of the International Law Commission of the United Nations is thought to be an event which may appropriately be taken note of in this Section. Accordingly, the Statute[1] of that Commission is printed in this volume, together with some account of the proceedings of its first Session.[2]

A. *PERMANENT ORGANIZATIONS*[3]

I. *The World Meteorological Organization* (*W.M.O.*)

The original steps taken towards the securing of international co-operation in meteorological observation belong to the sphere of private rather than public international organization. They date at least from 1872, when the directors of the meteorological services of the principal European countries met unofficially at Leipzig. In the year following there was convened an official congress of the same functionaries at Vienna. A Permanent Committee was set up by the Vienna congress, and a second congress met at Rome in 1879. The foundation of the International Meteorological Organization is considered, however, to date from 1878, when the Permanent Committee, meeting at Utrecht, drew up a species of constitution which the Rome congress endorsed. The Organization thus formed was governed by statutes adopted in 1919 and several times revised after that date. The principal organs provided for were: (1) the Conference of Directors, (2) the International Meteorological Committee, and (3) a permanent Secretariat. The Conference of Directors, or periodic plenary organ, consisted in the directors of the several autonomous meteorological services of the principal countries and colonies of the world, and was called into session in principle at six-year intervals. The International Meteorological Committee emerged in practice as a more restricted body and consisted in the representatives of twenty-six countries or territories, the Chairman and six such representatives constituting an Executive Council. The Committee met at three-year intervals generally, as did also the various technical commissions and sub-commissions of the Organization, the activities of which formed an important part of the latter's work. Amongst the Commissions the Commission for Aeronautical Meteorology held a particularly important place. Other important Commissions were the Aerological Commission, appointed in 1919 and having its seat in Berlin, and the International Commission for Maritime Meteorology, first set up in 1907 and revived in 1919. The permanent secretariat of the Congress had its seat at De Bilt, The Netherlands.[4]

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[1] See *infra*, p. 524.

[2] See *infra*, p. 508.

[3] For the scheme of arrangement of this section the reader is referred to this *Year Book*, 23 (1946), pp. 394–8.

[4] For a concise account of the constitution and history of the International Meteorological

The Second World War, which caused the virtual suspension of the activities of the International Meteorological Organization, brought in its train developments in aviation which rendered the field of meteorology one of increasing interest and importance to governments.[1] In consequence, the restoration of peace saw both the resumption of its technical work by the Organization and a movement for the extension of international co-operation in regard to that work. The culmination of that movement was the drafting, at the 12th Conference of Directors, held at Washington in September 1947,[2] of a Convention of the World Meteorological Organization, the text of which is printed below. This instrument, which will come into force when ratified or acceded to by thirty states,[3] contemplates the replacement of the former semi-official Organization, whose constitution reposed upon no inter-state treaty and the delegates to which had no diplomatic quality, by a wholly official organization.

The Organization thus contemplated is, however, open not only to states or Members of the United Nations (Art. 3 (*a*), (*b*), (*c*)), but also to 'any territory or group of territories maintaining its own meteorological service' (Art. 3 (*d*), (*e*), (*f*)). The right to membership is unqualified in relation to Members of the United Nations and to states represented at the Washington Conference of Directors (Art. 3 (*a*), (*b*) and Annex I), and also to such non-self-governing territories or groups of territories as are dependencies of states represented at the same conference (Art. 3 (*d*) and Annex II). In the case of other states and territories or groups of territories, however, with the exception of trust territories of which the United Nations may itself be the administering authority (see Art. 3 (*f*)), the approval of a two-thirds majority of the states members of the Organization is required to their admission (Art. 3 (*c*), (*e*)). The Conference of Directors, by a special resolution,[4] drew attention to the effect of these stipulations upon the twenty-eight states or territories, the directors of whose meteorological services were not either present or represented at Washington. Such states or territories fall into the following groups: (1) states which were merely not represented, i.e. Spain, Afghanistan, Bolivia, the Byelorussian S.S.R., Haiti, Iraq, Luxembourg, Peru, and the Ukrainian S.S.R.; (2) the former enemy states of Austria

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Organization see the League of Nations *Handbook of International Organisations* (1938), pp. 140–2. As to the budget thereof see p. 497, n. 5, *infra* and see also United States Department of State, Division of Conferences, *American Delegations to International Conferences, &c.* (1938), pp. 130–1. See also United Nations, *Selected Bibliography of the Specialised Agencies* (1949), p. 28, as to recent publications of the Organization. And see *Final Report of the Twelfth Conference of Directors*, Washington, 1947. As to the Aerological Commission, which had a distinct seat at Berlin and issued its own publications though it was governed by the same statutes as the Organization, see the League of Nations *Handbook*, &c., p. 105. Other Commissions of the Organization are or were those on Bibliography, Climatology, Radioatmospherics, the Study of Clouds, Agricultural Meteorology, Terrestrial Magnetism and Atmospheric Electricity, Map Projections, Polar Meteorology, Solar Radiation and Synoptic Weather Information. See the sources cited and see also Cates in *Department of State Bulletin*, 18 (1948), pp. 43–6. A special Committee for the Polar Year 1932–3 was set up at Copenhagen in 1929 and co-operated with such other international scientific bodies as the International Union for Geodesy and Geophysics, receiving subventions for its work from the Rockefeller Foundation and other sources. See the League of Nations *Handbook*, &c., p. 151. Regional Commissions have for some time been an important feature of the constitution of the Organization. The first three established were for Africa, the Far East, and South America (League of Nations *Handbook*, &c., p. 142). There are now three more in existence (see United Nations, *Bibliography*, &c., p. 28).

[1] See the Introductory to the texts of the *Final Act* of the Washington Conference of Directors and of the Convention of the World Meteorological Organization presented to Parliament by the Secretary of State for Air, June 1948, Cmd. 7427, where it is also stated that by 1947 the Directors of the meteorological Services of 84 countries and colonies were members of the International Meteorological Organization. Cates, loc. cit., gives the number as 88. An official *Liste des Membres de l'O.M.I.* is published.

[2] As to the text of the *Final Act* of the Conference see the preceding note. And as to the Conference in general see Cates, loc. cit.

[3] Art. 35, *infra*, p. 505.

[4] *Final Act*, loc. cit., p. 4.

and Bulgaria;[1] (3) the former independent states of Estonia, Latvia, and Lithuania;[2] (4) Palestine and Mongolia, and (5) various dependencies of states which were represented. The special case of Spain was dealt with by a resolution of the Conference recognizing the inability of that country to exercise any rights in the old Organization or to become a member of the new so long as the General Assembly's resolution of 12 December 1946[3] should remain in force.[4] As for the rest of the categories mentioned, whilst the countries in groups (1) to (4) are disabled from free acquisition of membership of the new Organization, unless they are or first become Members of the United Nations, the position of the territories in group (5) is safeguarded.[5]

Though the transition from the stage of semi-official to official organization in this sphere is marked by the fact that membership of the new Organization is restricted to states and territories or groups of territories and by the fact that it is these that are to nominate delegates to the World Meteorological Congress—'the supreme body of the Organization' (Art. 6 (*a*))—the predominantly scientific character of the new institution is its principal characteristic. It is thus provided that delegations are to be led by directors of meteorological services and that 'with a view to securing the widest possible technical representation, any director of a meteorological service or any other individual may be invited by the President to be present at and to participate in the discussions of the Congress' (Art. 6). Moreover, the President and the two Vice-Presidents of the Organization, as well as all other members of the Executive Committee, must be meteorologists of directorial rank (Arts. 5 (*a*), 13) and are required 'to regard themselves as representatives of the Organization rather than as representatives of particular Members thereof' (Art. 5 (*b*)). The Congress is a periodic organ, which is to meet at intervals of not longer than four years (Art. 9) and has a general legislative function to adopt 'technical regulations concerning meteorological practices and procedures' and 'to make recommendations to Members on matters within the purposes of the Organization' (Art. 7 (*d*), (*f*)), these purposes being in particular to facilitate co-operation in the establishment of networks of stations for making observations and to promote the standardization and rapid exchange of weather information (Art. 2). An interesting stipulation in the Convention is that a majority of the Members is required to constitute a quorum for meetings of the Congress (Art. 11). Each Member has one vote at such meetings except that Members which are states may alone vote in connexion with the special matters of amendment or interpretation of the Convention, Membership, relations with other organizations, and elections (Art. 10).

The Executive Committee is, in a sense, the executive not merely of the Congress but also of the Regional Meteorological Associations, which are an essential part of the

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[1] Roumania and Finland were represented at the Conference (see Annex II to the Convention, *infra*, p. 506).

[2] As to the position of these states in relation to the Universal Postal Union see this *Year Book*, 25 (1948), pp. 460–1.

[3] *United Nations, Resolutions adopted by the General Assembly during the Second Part of its First Session*, p. 63.

[4] *Final Act*, loc. cit., p. 5. As to the similar action of the Postal Union Congress of 1947 see this section of this *Year Book*, 25 (1948), p. 460.

[5] The suggestion (see Cates, loc. cit., at p. 46) that the adoption of the text of Art. 3 of the Convention merely postpones consideration of the position of those entities whose situation in international law is at the moment unclear would not appear to be wholly correct. The requirement of consent by a two-thirds majority of states Members to their admission to the new Organization, notwithstanding that the directors of their meteorological services may have been members of the International Meteorological Organization, must surely prejudge the question to some extent. In any event it is clear that Art. 3 will not enable the W.M.O. to evade such 'political' decisions upon questions of membership as the U.P.U. has had to take: see this section of this *Year Book*, 25 (1948), pp. 460–5. The lack of concern of a scientific organization with such questions was adduced at the Washington Conference as a reason for not transforming the International Meteorological Organization into an 'official' body, just as it was used as an argument against the transformation of the U.P.U. into a specialized agency: Cates, loc. cit., p. 45.

Organization (cf. Art. 4 (*a*)). The Regional Associations, which will replace the Regional Commissions of the International Meteorological Organization,[1] are to be established by the Congress in conformity with geographical limits to be laid down (Art. 7 (*i*)). The Executive Committee is to consist of the President and Vice-Presidents of the Organization, the Presidents of the Regional Associations or their alternats and, subject to a rule that not more than one-third of the Committee shall come from one region, Directors of as many meteorological services of Members as there may be regions (Art. 13). The Executive Committee is to meet at least once a year (Art. 15). It is to execute such policies as the Congress may formulate and to exercise the quasi-legislative functions of the latter in cases of urgency (Art. 14 (*a*), (*b*)).

The Convention also provides for the establishment of appropriate Technical Commissions (Art. 19) and for a permanent Secretariat (Arts. 20–2). There are, in addition, provisions of a standard sort for the financing of the Organization upon a basis of proportional contribution to its expenses (Arts. 23–4), for its enjoyment of privileges and immunities (Art. 27), for the arbitration of disputes as to the interpretation or application of the Convention (Art. 29), for the amendment of the latter (Art. 28), for withdrawal from membership on a year's notice (Art. 30), and for suspension of Members who fail either to meet their financial obligations or otherwise fail in their obligations under the Convention (Art. 31). The obligation of Members other than to contribute to the support of the Organization is to 'do their utmost to implement the decisions of the Congress' (Art. 8 (*a*)). This reference to 'decisions' presumably connotes the adoption of technical regulations rather than the making of recommendations to Members.

The Convention also provides that the Organization shall be brought into relationship with the United Nations in accordance with the terms of Article 57 of the Charter (Art. 25). In this connexion the action of the Washington Conference of Directors with respect to Spain is to be noted, as is also its direction to the Executive Council (of the International Meteorological Organization) to prepare a draft of an agreement between the new Organization and the United Nations.[2] Such a draft has been prepared.[3] However, though negotiations with the representatives of the Economic and Social Council have taken place, 'discussion of [its] terms is still at an informal stage pending the coming into definite existence of the . . . Organization'.[4]

The Conference of Directors further directed that 'as soon as practicable after the entry into force of the . . . Convention, the President of the International Meteorological Committee sh[ould] convene an extraordinary session of the Conference of Directors . . . for the purpose of taking the necessary steps for transferring to the World Meteorological Organization the functions, activities, assets and obligations of the International Meteorological Organization and making provision for the dissolution of the International Meteorological Organization' but agreed that 'during the period in between the entry into force of the Convention . . . and the first meeting of the Congress . . . the International Meteorological Organization sh[ould] carry on its usual functions through its established bodies and under its existing financial arrangements[5] in order to ensure the necessary continuity in the world-wide co-operation of meteorological services'.[6]

If it be permissible to regard the International Meteorological Organization as an international organization proper—as is perhaps the case in view of the fact that membership thereof was confined to government meteorologists—it is evident that the new Organization which is to replace it does not differ markedly from its forerunner. The position is, as it were, that the old Organization has paid a certain price for the sake of official connexion with the United Nations. This price is the familiar one of acceptance of a political principle of membership. The technique whereby control over admission of members is secured—the device of the reservation to states which are Members, as distinct from other categories of members, of all voting rights on certain matters[1]—is, however, both unique and ingenious.[2] It is reminiscent of the method of apportionment of legislative sovereignty in federal states by means of the institution of lists of 'reserved subjects'. Inasmuch as it enables membership of the Organization to be extended to entities other than states it has considerable merit. Considered as a limitation upon the doctrine of equality of states, it is to be preferred to the device of associate membership.[3] But its use for the purpose of extending the application of the doctrine that membership of the organized international community should be confined to particular states and that refusal of membership is a penal measure is perhaps open to question.[4]

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[1] See p. 494, n. 4, *supra.*

[2] *Final Act,* loc. cit., p. 5.

[3] See Cmd. 7427, Introductory, para. 7 (p. 3); Cates, loc. cit., p. 46. The draft was drawn up by a committee consisting of representatives of the Governments of France, Norway, Portugal, the United Kingdom, and the United States, an interesting feature of the constitution of which is that Portugal is not, of course, a Member of the United Nations.

[4] See U.N. Docs. E/C1/36, E/768, E/1317.

[5] The budget of the International Meteorological Organization for 1947–8, which the Washington Conference increased by 50 per cent., was $50,000 (Cates, loc. cit., p. 44).

[6] *Final Act,* loc. cit., p. 5.

CONVENTION OF THE WORLD METEOROLOGICAL ORGANIZATION[5]

With a view to co-ordinating, standardising and improving world meteorological activities and to encouraging an efficient exchange of meteorological information between countries in the aid of human activities the contracting States agree to the present Convention, as follows:

PART I. ESTABLISHMENT

Article 1

The World Meteorological Organisation (hereinafter called the Organisation) is hereby established.

PART II

Article 2. Purposes

The purposes of the Organisation shall be:

(*a*) To facilitate world-wide co-operation in the establishment of networks of stations for the making of meteorological observations or other geophysical observations related to meteorology and to promote the establishment and maintenance of meteorological centres charged with the provision of meteorological services;

(*b*) To promote the establishment and maintenance of systems for the rapid exchange of weather information;

(*c*) To promote standardisation of meteorological observations and to ensure the uniform publication of observations and statistics;

(*d*) To further the application of meteorology to aviation, shipping, agriculture, and other human activities; and

(*e*) To encourage research and training in meteorology and to assist in co-ordinating the international aspects of such research and training.

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[1] See Art. 10 (*a*) of the Convention, *infra*, p. 501.

[2] The Organization will not be unique in the sense that there is no other international organization the membership of which extends beyond the circle of sovereign states (see as to the U.P.U. this section of this *Year Book*, 25 (1948), pp. 457–72). But the Convention differs from the Postal Union Convention in that it deliberately contemplates the admission of new non-sovereign members, a situation excluded in the case of the U.P.U. since the restrictive interpretation of the term 'country' contained in its constituent instrument which was effected at the Cairo Congress of 1934 (ibid., p. 463). Nor is the reservation in part of voting power in particular matters to a restricted circle of the members of an international organization unknown. The division of competence between the General Assembly and the Security Council produces the same result within the United Nations. But the Convention here discussed appears to be the first instrument in which this precise provision has been made.

[3] See the discussion thereof in this section of this *Year Book*, 25 (1948), p. 463.

[4] Compare this section of this *Year Book*, 23 (1946), p. 460.

[5] Text taken from Cmd. 7427.

PART III. MEMBERSHIP

Article 3. Members

The following may become Members of the Organisation by the procedure set forth in the present Convention:

(*a*) Any State represented at the Conference of Directors of the International Meteorological Organisation convened at Washington, D.C., on 22nd September, 1947, as listed in Annex I attached hereto, and which signs the present Convention and ratifies it in accordance with Article 32, or which accedes thereto, in accordance with Article 33;

(*b*) Any Member of the United Nations having a meteorological service by acceding to the present Convention in accordance with Article 33;

(*c*) Any State, fully responsible for the conduct of its international relations and having a meteorological service, not listed in Annex I of the present Convention and not a Member of the United Nations, after the submission of a request for membership to the Secretariat of the Organisation and after its approval by two-thirds of the Members of the Organisation as specified in paragraphs (*a*), (*b*) and (*c*) of this Article by acceding to the present Convention in accordance with Article 33;

(*d*) Any territory or group of territories maintaining its own meteorological service and listed in Annex II attached hereto, upon application of the present Convention on its behalf, in accordance with paragraph (*a*) of Article 34, by the State or States responsible for its international relations and represented at the Conference of Directors of the International Meteorological Organisation convened at Washington, D.C., on 22nd September, 1947, as listed in Annex I of the present Convention;

(*e*) Any territory or group of territories, not listed in Annex II of the present Convention, maintaining its own meteorological service but not responsible for the conduct of its international relations, on behalf of which the present Convention is applied in accordance with paragraph (*b*) of Article 34, provided that the request for membership is presented by the Member responsible for its international relations, and secures approval by two-thirds of the Members of the Organisation as specified in paragraphs (*a*), (*b*) and (*c*) of this Article;

(*f*) Any trust territory or group of trust territories maintaining its own meteorological service and administered by the United Nations to which the United Nations applies the present Convention in accordance with Article 34.

Any request for membership in the Organisation shall state in accordance with which paragraph of this Article Membership is sought.

PART IV. ORGANISATION

Article 4

(*a*) The Organisation shall comprise:

- (1) The World Meteorological Congress (hereinafter called the Congress);
- (2) The Executive Committee;
- (3) Regional Meteorological Associations (hereinafter called the Regional Associations);
- (4) Technical Commissions;
- (5) The Secretariat.

(*b*) There shall be a President and two Vice-Presidents of the Organisation who shall also be President and Vice-Presidents of the Congress and of the Executive Committee.

PART V. ELIGIBILITY

Article 5

(*a*) Eligibility for election to the offices of President and Vice-President of the Organisation, of President and Vice-President of the Regional Associations, and for membership, subject to the provisions of Article 13 (*c*) of the present Convention, of the Executive

Committee should be confined to the Directors of Meteorological Services of Members of the Organisation.

(*b*) In the performance of their duties, the officers of the Organisation and the members of the Executive Committee should regard themselves as representatives of the Organisation rather than as representatives of particular Members thereof.

Part VI. The World Meteorological Congress

Article 6. Composition

(*a*) The Congress is the supreme body of the Organisation and shall be composed of delegates representing Members. Each Member shall designate one of its delegates, who should be the director of its meteorological service, as its principal delegate.

(*b*) With a view to securing the widest possible technical representation, any director of a meteorological service or any other individual may be invited by the President to be present at and participate in the discussions of the Congress.

Article 7. Functions

The functions of the Congress shall be:

(*a*) To determine general regulations, subject to the provisions of the present Convention, prescribing the constitution and the functions of the various bodies of the Organisation;

(*b*) To determine its own rules of procedure;

(*c*) To elect the President and Vice-Presidents of the Organisation, and other Members of the Executive Committee, in accordance with the provisions of Article 10 (*a*) (4) of the present Convention. Presidents and Vice-Presidents of Regional Associations and Technical Commissions shall be elected in accordance with the provisions of Articles 18 (*e*) and 19 (*c*) respectively, of the present Convention;

(*d*) To adopt technical regulations covering meteorological practices and procedures;

(*e*) To determine general policies for the fulfilment of the purposes of the Organisation as set forth in Article 2 of the present Convention;

(*f*) To make recommendations to Members on matters within the purposes of the Organisation;

(*g*) To refer to any other body of the Organisation any matter within the provisions of the present Convention upon which such body is empowered to act;

(*h*) To consider the reports and activities of the Executive Committee and to take such action in regard thereto as the Congress may determine;

(*i*) To establish Regional Associations in accordance with the provisions of Article 18; to determine their geographical limits, co-ordinate their activities, and consider their recommendations;

(*j*) To establish Technical Commissions in accordance with the provisions of Article 19; to define their terms of reference, co-ordinate their activities, and consider their recommendations;

(*k*) To determine the location of the Secretariat of the Organisation;

(*l*) To take any other appropriate action to further the purposes of the Organisation.

Article 8. Execution of Congress Decisions

(*a*) All Members shall do their utmost to implement the decisions of the Congress.

(*b*) If, however, any Member finds it impracticable to give effect to some requirement in a technical resolution adopted by Congress, such Member shall inform the Secretary-General of the Organisation whether its inability to give effect to it is provisional or final, and state its reasons therefore.

Article 9. Meetings

Meetings of the Congress shall be convened by decision of the Congress or of the Executive Committee at intervals not exceeding four years.

Article 10. Voting

(*a*) Each Member shall have one vote in decisions of the Congress, except that only Members of the Organisation which are States, as specified in paragraphs (*a*), (*b*) and (*c*) of Article 3 of the present Convention (hereinafter referred to as 'Members which are States'), shall be entitled to vote on any of the following subjects:

(1) Amendment or interpretation of the present Convention or proposals for a new Convention;
(2) Membership of the Organisation;
(3) Relations with the United Nations and other inter-governmental organisations;
(4) Election of the President and Vice-Presidents of the Organisation and of the members of the Executive Committee other than the Presidents and Vice-Presidents of the Regional Associations.

(*b*) Decisions of the Congress shall be by two-thirds majority of the votes cast for and against, except that elections of individuals to serve in any capacity in the Organisation shall be by simple majority of the votes cast. The provisions of this paragraph, however, shall not apply to decisions taken in accordance with Articles 3, 25, 26, and 28 of the present Convention.

Article 11. Quorum

A majority of the Members shall be required to constitute a quorum for meetings of the Congress. For those meetings of the Congress at which decisions are taken on the subjects enumerated in paragraph (*a*) of Article 10, a majority of the Members which are States shall be required to constitute a quorum.

Article 12. First Meeting of the Congress

The first meeting of the Congress shall be convened by the President of the International Meteorological Committee of the International Meteorological Organisation as soon as practicable after the coming into force of the present Convention.

PART VII. THE EXECUTIVE COMMITTEE

Article 13. Composition

The Executive Committee shall consist of:

(*a*) The President and Vice-President of the Organisation;

(*b*) The Presidents of Regional Associations, or in the event that Presidents cannot attend, alternates as provided for in the general regulations;

(*c*) Directors of Meteorological Services of Members of the Organisation or their alternates, equal in number to the number of Regions, provided that not more than one-third of the members of the Executive Committee, including the President and Vice-Presidents of the Organisation, shall come from one region.

Article 14. Functions

The Executive Committee is the executive body of the Congress and its functions shall be:

(*a*) To supervise the execution of the resolutions of the Congress;

(*b*) To adopt resolutions arising out of recommendations of the Technical Commissions on matters of urgency affecting the technical regulations, provided that all Regional Associations concerned are given an opportunity to express their approval or disapproval before adoption by the Executive Committee;

(*c*) To provide technical information, counsel, and assistance in the field of meteorology;

(*d*) To study and make recommendations on any matter affecting international meteorology and the operation of meteorological services;

(*e*) To prepare the agenda for the Congress and to give guidance to the Regional Associations and Technical Commissions in the preparation of their agenda;

(*f*) To report on its activities to each session of the Congress;

(*g*) To administer the finances of the Organisation in accordance with the provisions of Part XI of the present Convention;

(*h*) To perform such other functions as may be conferred on it by the Congress or by the present Convention.

Article 15. Meetings

The Executive Committee shall meet at least once a year. The time and place of the meeting shall be determined by the President of the Organisation, taking account of the views of the other members of the Committee.

Article 16. Voting

Decisions of the Executive Committee shall be by two-thirds majority of the votes cast for and against. Each member of the Executive Committee shall have only one vote, notwithstanding that he may be a member in more than one capacity.

Article 17. Quorum

The quorum shall consist of a majority of the members of the Executive Committee.

PART VIII. REGIONAL ASSOCIATIONS

Article 18

(*a*) Regional Associations shall be composed of the Members of the Organisation, the networks of which lie in or extend into the Region.

(*b*) Members of the Organisation shall be entitled to attend the meetings of Regional Associations to which they do not belong, take part in the discussions, present their views upon questions affecting their own Meteorological Service, but shall not have the right to vote.

(*c*) Regional Associations shall meet as often as necessary. The time and place of the meeting shall be determined by the Presidents of the Regional Associations in agreement with the President of the Organisation.

(*d*) The functions of the Regional Associations shall be:

(i) To promote the execution of the resolutions of Congress and the Executive Committee in their respective regions;

(ii) To consider matters brought to their attention by the Executive Committee;

(iii) To discuss matters of general meteorological interest and to co-ordinate meteorological and associated activities in their respective regions;

(iv) To make recommendations to Congress and the Executive Committee on matters within the purposes of the Organisation;

(v) To perform such other functions as may be conferred on them by the Congress.

(*e*) Each Regional Association shall elect its President and Vice-President.

PART IX. TECHNICAL COMMISSIONS

Article 19

(*a*) Commissions consisting of technical experts may be established by the Congress to study and make recommendations to the Congress and the Executive Committee on any subject within the purposes of the Organisation.

(*b*) Members of the Organisation have the right to be represented on the Technical Commissions.

(*c*) Each Technical Commission shall elect its President and Vice-President.

(*d*) Presidents of Technical Commissions may participate without vote in the meetings of the Congress and of the Executive Committee.

PART X. THE SECRETARIAT

Article 20

The permanent Secretariat of the Organisation shall be composed of a Secretary-General and such technical and clerical staff as may be required for the work of the Organisation.

Article 21

(*a*) The Secretary-General shall be appointed by the Congress on such terms as the Congress may approve.

(*b*) The staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Executive Committee in accordance with regulations established by the Congress.

Article 22

(*a*) The Secretary-General is responsible to the President of the Organisation for the technical and administrative work of the Secretariat.

(*b*) In the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any authority external to the Organisation. They shall refrain from any action which might reflect on their position as international officers. Each Member of the Organisation on its part shall respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not seek to influence them in the discharge of their responsibilities to the Organisation.

PART XI. FINANCES

Article 23

(*a*) The Congress shall determine the maximum expenditures which may be incurred by the Organisation on the basis of estimates submitted by the Secretary-General and recommended by the Executive Committee.

(*b*) The Congress shall delegate to the Executive Committee such authority as may be required to approve the annual expenditures of the Organisation within the limitations determined by the Congress.

Article 24

The expenditures of the Organisation shall be apportioned among the Members of the Organisation in the proportions determined by the Congress.

PART XII. RELATIONS WITH THE UNITED NATIONS

Article 25

The Organisation shall be brought into relationship with the United Nations pursuant to Article 57 of the Charter of the United Nations, subject to the approval of the terms of the agreement by two-thirds of the Members which are States.

PART XIII. RELATIONS WITH OTHER ORGANISATIONS

Article 26

(*a*) The Organisation shall establish effective relations and co-operate closely with such other inter-governmental organisations as may be desirable. Any formal agreement entered into with such organisations shall be made by the Executive Committee, subject to approval by two-thirds of the Members which are States.

(*b*) The Organisation may on matters within its purposes make suitable arrangements for consultation and co-operation with non-governmental international organisations and, with the consent of the government concerned, with national organisations, governmental or non-governmental.

(*c*) Subject to approval by two-thirds of the Members which are States, the Organisation may take over from any other international organisation or agency, the purpose and activities of which lie within the purposes of the Organisation, such functions, resources, and obligations as may be transferred to the Organisation by international agreement or by mutually acceptable arrangements entered into between the competent authorities of the respective organisations.

PART XIV. LEGAL STATUS, PRIVILEGES AND IMMUNITIES

Article 27

(*a*) The Organisation shall enjoy in the territory of each Member such legal capacity as may be necessary for the fulfilment of its purposes and for the exercise of its functions.

(*b*) (i) The Organisation shall enjoy in the territory of each Member to which the present Convention applies such privileges and immunities as may be necessary for the fulfilment of its purposes and for the exercise of its functions.

(*b*) (ii) Representatives of Members and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

(*c*) Such legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organisation in consultation with the Secretary-General of the United Nations and concluded between the Members which are States.

PART XV. AMENDMENTS

Article 28

(*a*) The text of any proposed amendment to the present Convention shall be communicated by the Secretary-General to Members of the Organisation at least six months in advance of its consideration by the Congress.

(*b*) Amendments to the present Convention involving new obligations for Members shall require approval by the Congress, in accordance with the provisions of Article 10 of the present Convention, by a two-thirds majority vote, and shall come into force on acceptance by two-thirds of the Members which are States for each such Member accepting the amendment and thereafter for each remaining such Member on acceptance by it. Such amendments shall come into force for any Member not responsible for its own international relations upon the acceptance on behalf of such a Member by the Member responsible for the conduct of its international relations.

(*c*) Other amendments shall come into force upon approval by two-thirds of the Members which are States.

PART XVI. INTERPRETATION AND DISPUTES

Article 29

Any question or dispute concerning the interpretation or application of the present Convention which is not settled by negotiation or by the Congress shall be referred to an independent arbitrator appointed by the President of the International Court of Justice, unless the parties concerned agree on another mode of settlement.

PART XVII. WITHDRAWAL

Article 30

(*a*) Any Member may withdraw from the Organisation on twelve months' notice in writing given by it to the Secretary-General of the Organisation, who shall at once inform all the Members of the Organisation of such notice of withdrawal.

(*b*) Any Member of the Organisation not responsible for its own international relations may be withdrawn from the Organisation on twelve months' notice in writing given by the Member or other authority responsible for its international relations to the Secretary-General of the Organisation, who shall at once inform all the Members of the Organisation of such notice of withdrawal.

PART XVIII. SUSPENSION

Article 31

If any Member fails to meet its financial obligations to the Organisation or otherwise fails in its obligations under the present Convention, the Congress may by resolution suspend it from exercising its rights and enjoying its privileges as a Member of the Organisation until it has met such financial or other obligations.

PART XIX. RATIFICATION AND ACCESSION

Article 32

The present Convention shall be ratified by the signatory States and the instruments of ratification shall be deposited with the Government of the United States of America, which will notify each signatory and acceding State of the date of deposit thereof.

Article 33

Subject to the provisions of Article 3 of the present Convention, accession shall be effected by the deposit with the Government of the United States of America of an instrument of accession, which shall take effect on the date of its receipt by the Government of the United States of America, which will notify each signatory and acceding State thereof.

Article 34

Subject to the provisions of Article 3 of the present Convention:

(*a*) Any contracting State may declare that its ratification of, or accession to, the present Convention includes any territory or group of territories for the international relations of which it is responsible.

(*b*) The present Convention may at any time thereafter be applied to any such territory or group of territories upon a notification in writing to the Government of the United States of America and the present Convention shall apply to the territory or group of territories on the date of the receipt of the notification by the Government of the United States of America, which will notify each signatory and acceding State thereof.

(*c*) The United Nations may apply the present Convention to any trust territory or group of trust territories for which it is the administering authority. The Government of the United States of America will notify all signatory and acceding States of any such application.

PART XX. ENTRY INTO FORCE[1]

Article 35

The present Convention shall come into force on the thirtieth day after the date of the deposit of the thirtieth instrument of ratification or accession. The present Convention shall come into force for each State ratifying or acceding after that date on the thirtieth day after the deposit of its instrument of ratification or accession.

The present Convention shall bear the date on which it is opened for signature and shall remain open for signature for a period of 120 days thereafter.

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[1] 42 of the 45 (see Annex I) States represented at Washington signed the Convention before its closure, the exceptions being the U.S.S.R., Roumania, and Venezuela (Cmd. 7427, Appendix). Amongst the signatories was the Government of the Dominican Republic, which was represented despite the fact that the director of its meteorological service was not a member of the Conference of Directors (Cates, loc. cit., p. 44). By July 1949 eight Governments (including in particular that of the United Kingdom and that of the former enemy state of Finland) had ratified the Convention, whilst five (including those of the U.S.S.R. and Roumania) had acceded thereto (*U.N. Press Release*, SA/42, 28 July 1949).

ANNEX I

STATES REPRESENTED AT THE CONFERENCE OF DIRECTORS OF THE INTERNATIONAL METEOROLOGICAL ORGANISATION CONVENED AT WASHINGTON, D.C., ON 22ND SEPTEMBER, 1947

Argentina.
Australia.
Belgium.
Brazil.
Burma.
Canada.
Chile.
China.
Colombia.
Cuba.
Czechoslovakia.
Denmark.
Dominican Republic.
Ecuador.
Egypt.
Finland.
France.
Greece.
Guatemala.
Hungary.
Iceland.
India.
Ireland.
Italy.
Mexico.
Netherlands.
New Zealand.
Norway.
Pakistan.
Paraguay.
Philippines.
Poland.
Portugal.
Roumania.
Siam.
Sweden.
Switzerland.
Turkey.
Union of South Africa.
Union of Soviet Socialist Republics.
United Kingdom of Great Britain and Northern Ireland.
United States of America.
Uruguay.
Venezuela.
Yugoslavia.

ANNEX II

TERRITORIES OR GROUPS OF TERRITORIES WHICH MAINTAIN THEIR OWN METEOROLOGICAL SERVICES AND OF WHICH THE STATES RESPONSIBLE FOR THEIR INTERNATIONAL RELATIONS ARE REPRESENTED AT THE CONFERENCE OF DIRECTORS OF THE INTERNATIONAL METEOROLOGICAL ORGANISATION CONVENED AT WASHINGTON, D.C., 22ND SEPTEMBER, 1947

Anglo-Egyptian Sudan.
Belgian Congo.
Bermuda.
British East Africa.
British Guiana.
British West Africa.
Cameroons.
Cape Verde Islands.
Ceylon.
Curaçao.
French Equatorial Africa.
French Oceanic Colonies.
French Somaliland.
French Togoland.
French West Africa.
Hong Kong.
Indo China.
Jamaica.
Madagascar.
Malaya.
Mauritius.
Morocco (not including the Spanish Zone).
Netherlands Indies.
New Caledonia.
Palestine.
Portuguese East Africa.
Portuguese West Africa.
Rhodesia.
Surinam.
Tunisia.

II. *The United Nations Food and Agriculture Organization* (*F.A.O.*)

Since the constitution of F.A.O. appeared in this section of the *Year Book*[1] that instrument has been amended and it is thought appropriate to chronicle here the changes effected. In the first place there was added, at the Second Session of the Conference (the plenary organ), at Copenhagen in September 1946, to the provision of Article III (The Conference), paragraph 4 of the Constitution, which originally stipulated merely that 'Each Member nation shall have only one vote', the words:

> 'A Member nation which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Conference if the amount of its arrears equals, or exceeds the amount of the contributions due from it for the preceding two full years. The Conference may, nevertheless, permit such a Member nation to vote if

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[1] 23 (1946), pp. 412–21.

it is satisfied that the failure to pay is due to conditions beyond the control of the Member nation.'[1]

This addition is clearly based on Article 18 of the Charter of the United Nations and it may be presumed that the suspension of voting rights for which it provides relates only to the Conference and not to other organs of the F.A.O., just as Article 18 of the Charter applies only in relation to the General Assembly and not in relation either to the Security and other Councils of the United Nations, or even to the Committees (including the Interim Committee) of the General Assembly.[2]

Secondly, there was effected, by means of amendments adopted at the Third Session of the Conference, at Geneva in September 1947, some change in the executive machinery of the Organization. Thus, whereas the original Article V (The Executive Committee) provided for an Executive Committee of from nine to fifteen members of the Conference, 'qualified by administrative experience or other special qualifications to contribute to the attainment of the purposes of the Organization', for the exercise of functions to be delegated by the Conference,[3] it is now provided:

Article V (Council of F.A.O.)

> '1. The Conference shall elect a Council of the Food and Agriculture Organization consisting of eighteen member nations, which will each be represented by one member. The Conference shall appoint an independent Chairman of the Council. The tenure and other conditions of office of the members of the Council shall be subject to rules to be made by the Conference.
>
> '2. The Conference may delegate to the Council such powers as it may determine, with the exception of powers set forth in paragraph 2 of Article II, paragraphs 1, 3, 4, 5 and 6 of Article IV, paragraph 1 of Article VII, Article XIII, and Article XX of this Constitution.
>
> '3. The Council shall appoint its officers other than the Chairman and, subject to any decisions of the Conference, shall adopt its own rules of procedure.
>
> '4. The Council shall establish a Co-ordinating Committee to tender advice on the co-ordination of technical work and the continuity of the activities of the Organization undertaken in accordance with the decisions of the Conference.'[4]

In conformity with this change references to the new Council were substituted for references to the former Executive Committee elsewhere in the Constitution.[5] The change perhaps implies a transformation of the executive organ of the Organization from a predominantly technical into a primarily political body. It is also possible to read into it some change in the constitutional theory of the Organization. It might thus appear that the quasi-managerial conception of the executive organs of that body has to some extent been abandoned. However, the Director-General of the F.A.O. still retains, subject to the general supervision of the Conference and Council, 'full power and authority to direct the work of the Organization'.[6] Notwithstanding that the emergency phase of the work of the Organization may be regarded as being over, his position has not been reduced to a mere secretarial level.[7] The amendments discussed, not involving new obligations for Member nations, took effect on adoption by the Conference by a two-thirds majority vote in accordance with Article XX (2) of the Constitution.[8]

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[1] Text taken from *Constitution of the Food and Agriculture Organization*, revised edn., 1947, published by the F.A.O., Washington, October 1947. As to the Copenhagen session of the Conference in general see *International Organization*, 1 (1947), pp. 121–3. As to the original text see this section of this *Year Book*, 23 (1946), p. 417.

[2] As to the genesis and effect of Article 18 of the Charter, see Koo, *Voting Procedures in International Political Organizations* (1947), pp. 246–52.

[3] See this section of this *Year Book*, 23 (1946), p. 418.

[4] As to the source of the text, see n. 1 *supra*.

[5] I.e. Art. VII (The Director General), paras. (2) and (3).

[6] Art. VII, para. (1).

[7] Compare Jenks in this *Year Book*, 22 (1945), pp. 42–4.

[8] See this *Year Book*, 23 (1946), p. 421.

III. *The International Law Commission*

The International Law Commission of the United Nations was set up by resolution 174 (II) of the General Assembly, dated 21 November 1947, to which its Statute is annexed. As the resolution referred to recites, it was established in order to implement Article 13 (1) (*a*) of the Charter, whereby the General Assembly is charged with the initiation of studies and the making of recommendations for the purpose of encouraging the progressive development of international law and its codification.[1] Any appreciation of the suitability of the organ created for this important task has to be made in the light of the circumstance that the present members of the Commission were elected, at the third regular session of the General Assembly, for a three-year term and that the constitution and composition of the Commission will be subject to review at the end of that time. It may be argued that the status of the Commission as a subordinate organ of the General Assembly, and the fact that it may be exposed to political control which that status involves, are regrettable, and that the codification of international law should have been entrusted to an independent body, perhaps with status equivalent to that of the International Court of Justice.[2] Or, again, it may be said that a Commission of fifteen persons is too large a body for effective work.[3] Or it may be contended that a body whose members are called upon only for part-time service cannot make any effective progress with the great task imposed upon them. However, these seem to be theses which will have to be taken into account when the question of prolongation of the life of the Commission arises but which, given that the setting up of that body has been decided upon, cannot fairly be advanced before that time. In the meantime, it is important to examine the working of the Commission.

The Statute of the International Law Commission and the body set up under it illustrate most vividly the influence of the constituent instruments of international organizations upon their aims and achievements. For the principal significance of the Statute lies in the different approach to the problem of codification which the United Nations, as contrasted with the League of Nations, has adopted. It is possible, having regard to the part-time nature of the Commission and to the reliance upon the Secretariat of the United Nations which it must of necessity make, that the working of the former may provide examples of new forms of co-operation between the periodic or plenipotentiary organs of international organizations, on the one hand, and the permanent organs on the other. For these reasons there is included here an account of the proceedings of the first session of the Commission, which took place at Lake Success from 12 April to 9 June 1949. The account is of a somewhat fuller nature than the Commission's own Report to the General Assembly.[1] Various features of the Commission's Statute, to which this account is introductory, are discussed incidentally.

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[1] See *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 105. On 3 November 1948 the General Assembly appointed the following persons members of the Commission: MM. R. J. Alfaro, G. Amado, J. L. Brierly, R. Cordova, J. P. A. François S. Hsu, M. O. Hudson, Faris Bey el-Khoury, V. M. Koretsky, Sir Benegal Narsing Rau, A. E. F. Sandström, E. Scelle, J. Spiropoulos, J. M. Yepes, G. Zourek. All of them attended the first session of the Commission save MM. Faris Bey el-Khoury and Zourek. On the genesis of the Commission generally see R. Y. Jennings, 'The Progressive Development of International Law and its Codification', in this *Year Book*, 24 (1947), pp. 301–29, and Yuen-Li Liang, 'The First Phase of the Development and Codification of International Law under the United Nations', in *American Bar Association Journal*, 33, No. 8 (August 1947), and 'Methods for the Encouragement of the Progressive Development of International Law and its Codification', in the *Year Book of World Affairs*, 2 (1948), pp. 237–71.

For the Report of the Committee on the Progressive Development of International Law and its Codification, which recommended the setting up of the Commission, see U.N. Docs. A/AC. 10/51–3, reprinted in *American Journal of International Law*, 41 (1947), Suppl., pp. 18 f.; and for the very valuable preparatory memoranda submitted by the United Nations Secretariat to the Committee, see U.N. Docs. A/AC. 10/5–8, 22 and 25, mostly reprinted in *American Journal of International Law*, 41 (1947), Suppl., pp. 29 f. For the Statute of the Commission see U.N. Doc. A/CN. 4/4 (2 February 1949). And for the proceedings of the Sixth Committee of the General Assembly, wherein it was elaborated, see U.N. Docs. A/504, A/506 and the documents referred to therein.

[2] See Jennings, loc. cit., at p. 325.

[3] Cf. the suggestion of the International Law Association's Committee on the Development and Formulation of International Law for a body of seven members: *Report of the 42nd Conference* (Prague, 1947), pp. 82, 108.

1. *The Preparatory Work for the First Session*

There was already in the hands of the members of the Commission before their first meeting a series of documents prepared by temporary or permanent members of the Division for the Codification and Progressive Development of International Law, the branch of the Legal Affairs Department of the United Nations Secretariat charged in general with the 'servicing' of the Commission and with the performance of the Secretary-General's duty, under resolution 175 (II),[2] dated 21 November 1947, 'to do the necessary preparatory work for the beginning of the activity of the International Law Commission'. This series, which constitutes in itself a distinct contribution to the literature of international law, consists of the following:

1. Survey of International Law in Relation to the Work of Codification of the International Law Commission;[3]
2. A Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States;[4]
3. The Charter and Judgment of the Nürnberg Tribunal. History and Analysis;[5]
4. Ways and Means of Making the Evidence of Customary International Law More Readily Available;[6]
5. An Historical Survey of the Question of an International Criminal Jurisdiction.[7]

2. *The Agenda*

That the preparation of such a diverse series of memoranda should have come within the rubric of 'necessary preparatory work' becomes clear when it is seen that, by Article 18 (i) of its Statute, the Commission is directed to 'survey the whole field of international law with a view to selecting topics for codification . . .'; that by Article 24, it is directed to 'consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international law and [to] make a report to the General Assembly on this matter'; and that, by Article 13 (3), the Commission must 'give priority to requests of the General Assembly to deal with any question'.

In connexion with the provision of the Statute last quoted, it must be mentioned that requests to the Commission to deal with the special questions had been made by the General Assembly already before the former body met for the first time.[8] For, by resolution 177 (II) (21 November 1947) the General Assembly

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[1] *United Nations, General Assembly, Official Records, Fourth Session, Supplement* No. 10 (A/295), here referred to as *Report*. The documents and summary records of the meetings of the Commission are contained respectively in the series U.N. Doc. A/CN.4/ and A/CN.4/SR.

[2] *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, p. 110. As respects the Draft Declaration on the rights and duties of States this instruction was supplemented by resolution 178 (II), ibid., p. 112.

[3] A/CN.4/1/Rev.1 (10 February 1949), 70 pp.; here referred to as *Survey*.

[4] A/CN.4/2 (15 December 1948), 228 pp.; here referred to as *Preparatory Study*.

[5] A/CN.4/5 (1949), 99 pp.

[6] A/CN.4/6 (7 March 1949), 114 pp.

[7] A/CN.4/7 (27 May 1947). This document was published only after the session of the Commission had begun, and then in mimeograph form, without the Appendices.

The Secretariat also published, during the session, various working papers for the use of the Commission. These are contained in the series A/CN.4/W.

[8] Cf. R. Y. Jennings, loc. cit., pp. 325–6.

'Direct[ed] the Commission to:

(*a*) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and

(*b*) Prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (*a*) above.'[1]

Similarly, by resolution 178 (II), of the same date the General Assembly decided to

'entrust further study of . . . the Draft Declaration on the Rights and Duties of States presented by Panama . . . to the International Law Commission . . .'

and instructed that body to

'prepare a draft declaration on the rights and duties of States taking as a basis of discussion the draft declaration on the rights and duties of States presented by Panama, and taking into consideration other documents and drafts on this subject'.[2]

In the third place, by resolution 260 (III) B, dated 9 December 1948, the General Assembly invited the Commission to

'study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions'

and requested that body

'in carrying out this task, to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice'.[3]

Five matters of substance, two arising out of the Statute and three out of references by the General Assembly, were thus, in a sense, before the Commission as soon as it met. A sixth matter, not one of substance, was also before it. This arose out of Article 26 of the Statute, which relates principally to consultation by the Commission of international and national organizations, both official and unofficial, on matters under consideration by it. Paragraph (2) provides that 'For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. . . .' The Secretariat, in addition to having prepared material for the Commission upon every matter of substance before it save that of a draft code of offences against peace and security, having prepared a tentative list[4] in pursuance of the provision, this question also was placed on the draft agenda of the Commission.

The draft agenda[5] thus read:

(1) Organization of the Commission's work; Survey of international law with a view to selecting suitable topics for codification;

(2) Draft Declaration on the rights and duties of States;

(3) (*a*) Formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal;
  (*b*) Preparation of a draft code of offences against the peace and security of mankind;

(4) Desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred on that organ by international conventions;

(5) Ways and means of making the evidence of customary international law more readily available;

(6) Co-operation with other bodies:
  (*a*) Consultation with organs of the United Nations and with international and national organizations, official and non-official;
  (*b*) List of national and international organizations prepared by the Secretary-General for the purpose of distributing documents.

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[1] *United Nations, Official Records of the Second Session of the General Assembly, Resolutions*, pp. 111–12.

[2] Ibid., p. 112.

[3] *United Nations, Official Records of the Third Session of the General Assembly, Part I, Resolutions*, p. 177.

[4] A/CN.4/8.

[5] A/CN.4/9.

This provisional agenda was adopted by the Commission as soon as it had elected its Chairman,[1] Vice-Chairmen,[2] and Rapporteur[3] and had adopted its rules of procedure. And, the first item appearing to be the only one which related to the work of the Commission as a whole, it was first taken up, and made the basis of a general discussion as to how the Commission's work should be organized.

3. *Survey of International Law and the Selection of Topics for Codification*

The Secretariat's *Survey* which, as has been said, was in the hands of members of the Commission before they met is a document of striking breadth of view and is imbued with an eloquence and authority rare in official publications. Its first part is devoted to a detailed examination of the meaning of the term 'codification' as employed in the Statute of the Commission and of the effect of a determination of that meaning upon the choice of topics for codification in accordance with Article 18 (1). It stresses the care which is taken in Article 15 of the Statute to make clear that the antithesis between 'codification' and 'progressive development' was established for purposes of convenience only and advances the constructive thesis that, whilst the creation of new law upon subjects hitherto regulated by international law cannot be held to be 'codification', that rubric may embrace the reframing of rules on 'subjects which have been regulated by international law, but the regulation of which is unsatisfactory or fragmentary'. For 'the law with regard to these subjects has sufficiently developed, but it has not developed in a manner compatible with the requirements of a peaceful and neighbourly intercourse of States'.[4] In the light of a large interpretation of this order, the task of selection of topics for codification imposed on the Commission may be seen to be one of the assignment of priorities rather than anything else. It is not unduly influenced, as was that of the League of Nations Committee of Experts, by the existence or non-existence of a considerable measure of agreement between states upon the rules applicable to any particular topic,[5] nor even by the relative importance or unimportance of topics. Nor, in view of the liberty accorded to the Commission by Article 23 of its Statute[6] to give to its recommendations forms of greater or less solemnity and urgency, is it hampered by any need to confine any code drawn up with the somewhat rigid forms of drafts of conventions intended to be adopted by states.[7]

Part II of the *Survey* is a survey proper—of a great many, though not all, of the topics of international law, prepared in the light of the analysis of 'codification' made in Part I, as well, of course, as of earlier efforts at codification. This tour of the horizon does not touch upon 'fields already covered by existing international conventions such as those in the field of air law or of international postal communications', nor upon the realm of the conflict of laws, although in virtue of Article 1 (2) of its Statute the Commission 'is not precluded from entering the field of private international law'. Within its limits, which, as has been explained, are not claimed to be exhaustive, the survey presented is a remarkable achievement, which must serve, in a way, as a guiding-light to the makers and menders of international law for many years to come. It is followed by a short examination—which comprises Part III of the document—as to how the Commission might approach its great task of codification. The principal suggestions made in this regard are that the Commission should speedily arrive at an interpretation of the more obscure provisions in its charter—and notably of the criteria of 'necessity' and 'desirability' which are to guide its selection of topics for codification, and of the term 'recommendation' in Article 18 of the Statute;[1] that it should, whilst bearing always in mind the distinction between what is and what might profitably be made the law, not confine itself to the mere registration *legis latae*; and that it should, within the framework of a general plan for the codification of virtually the whole of international law, work principally through rapporteurs supported by sub-committees of the Commission itself.

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[1] Professor Manley O. Hudson, formerly Judge of the Permanent Court of International Justice.

[2] Professor V. M. Koretsky and Sir Benegal Narsing Rau: *Report*, para. 3.

[3] M. G. Amado: *Report*, para. 3.

[4] Para. 13.

[5] See, however, p. 514 *infra*, as to the reason given in the Commission for the retention of the régime of the high seas as a topic for codification.

[6] See p. 525, *infra*.

[7] The *Survey* concludes that the Commission may, where it considers that a draft is unlikely to secure wide support because the existing law is unsatisfactory or obsolete, make it the subject of a recommendation under paragraphs (*a*) or (*b*) of Art. 23 (1) rather than under paras. (*c*) or (*d*) and thus secure to it no more than 'preliminary status', exercising influence 'partly as [*a*] statement of the existing law and partly as [*a*] pronouncement of what is a rational and desirable development of the law' (*Survey*, para. 20).

The Commission considered this document in the course of a discussion which bore —as indeed did the *Survey* itself—not merely on the selection of topics for codification in accordance with Article 18 of the Statute, but upon the whole question of the range and organization of its task of codification. The consideration of the two questions of 'the power of the Commission with respect to the selection of topics' and of the 'Survey of international law' were thus not, in reality, so neatly distinguished as the Report would make it appear.[2]

There was, however, an extensive consideration of Article 18 of the Statute which, as the *Survey* pointed out,[3] concealed an ambiguity. Its stipulation, in paragraph 2, that 'when the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendation to the General Assembly' could be taken to mean that the decisions of the Commission respecting the selection, according to the criteria laid down, of any and every topic as suitable for codification are subject to confirmation by the General Assembly. That is to say, it might be held that the Commission, having come to the conclusion that the codification of a particular topic is 'necessary or desirable', must so report to the General Assembly and must await further instructions before proceeding to the actual work of codification. Alternatively, the paragraph could mean that the Commission is, in so far as concerns codification, free to go forward not only with the selection of topics but also with the preparation of drafts codifying such topics and is bound to report to the General Assembly only when, in accordance with Article 22 of the Statute, it has prepared 'a final draft and explanatory report' and is required by that article to 'submit [such draft] with its recommendations to the General Assembly'.[4] Each of these alternative interpretations was exhaustively argued in the Commission. Recourse was had to the summary records of meetings of the sub-committee of the Sixth Committee whereat the draft statute was debated, to discover only that two proposals had been made in that body with a view to the clarification of the offending paragraph, each reflecting one of the alternative constructions outlined above, and that neither had been adopted.[5] The then Rapporteur of the Sixth Committee, who was a member of the Commission, was consulted, his own recollection or opinion being that Article 18 (2) was intended to bear a meaning intermediate between the widest and the narrowest interpretation, and that the Commission did not require the approval of the General Assembly before entering on the study of a given question; it could even continue that study to a very advanced stage in order to be able to submit well-founded recommendations to the General Assembly; but it could not consult governments, nor send them questionnaires without first securing the assent of the General Assembly.[6]

Ultimately it was decided, by a majority of ten votes to three, to give an affirmative reply to the following question, formulated by the Chairman:

> 'Has the Commission competence to carry out its work according to the procedure provided in articles 19 to 23 without awaiting the General Assembly's decision on the recommendations submitted by the Commission under Article 18, paragraph 2?'[7]

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[1] See p. 527, *infra*.

[2] See paras. 9–12 and 13.

[3] Para. 106.

[4] See p. 527, *infra*.

[5] See the note to para. 106 of the *Survey*.

[6] A/CN.4/SR.3, pp. 3–6. No such limitation on the right of the Commission to issue questionnaires is apparent on the face of Art. 19 of the Statute, which governs the matter and as to which see p. 516, *infra*. See, however, p. 513, n. 1, *infra*.

[7] *Report*, para. 12. One of the three dissentients stated that he would have voted with the majority had there been no reference to Art. 23 of the Statute, it being 'obvious that in the case

The view may be ventured that, as a matter both of history[1] and of strict interpretation, the very narrowest construction contended for—that whereby the Commission would be restricted to the mere selection of topics for codification and disabled from proceeding to their codification in fact without the assent of the General Assembly—is probably the correct one. But it does not follow that this restriction, though intended, is well conceived. In any case there have to be taken into account two circumstances which render the differences between the various interpretations proposed minimal. The first is that, as was with great good sense urged by one member of the Commission at a very early stage of the debate, '[A] judgment . . . that the codification of the particular topic was necessary or desirable . . . could only be made after a thorough study of the subject, which would involve the application of articles 19 and following and would inevitably lead to the recommendations referred to in article 22'.[2] The second is that a subsidiary organ of the General Assembly, such as the Commission is, must inevitably report regularly to the parent body, as the Commission has in fact begun to do, so that criticism—or even veto—of its selection of topics for codification is possible at a relatively early stage of any particular enterprise.[3]

Having thus achieved a definition of its competence in the matter, the Commission had some discussion of the method of selection of topics for codification. The method in fact adopted was that of returning again to the *Survey* and of considering briefly the topics listed in Part II of that document, rejecting some out of hand and provisionally retaining others. The Secretariat produced a synopsis of the relevant pages, in the form of a work-

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of recommendations envisaged in that article, the Commission had to await the Assembly's reply before undertaking the work of codification'. Another of the minority would have voted in the opposite sense had the question applied to Art. 19 only.

[1] It is possible that, in reaching the conclusion which it did, the Commission did not take sufficient account of the fact that there is an historical identity between the procedure laid down in the Statute as respects codification and that prescribed in Arts. 16 and 17 for 'progressive development'—as indeed must follow from the fact that the distinction between the two processes is adopted only for convenience. The text and preparatory work of Arts. 16 and 17 make it clear that the Commission may not proceed with a project for 'progressive development' unless it has the authority of the General Assembly in virtue of the circumstance that the project originates with (*a*) that body (cf. Art. 16 pr.) or (*b*) an invitation from that body to proceed with a project originating elsewhere (cf. Art. 17 (*d*)). But the matter is highly obscure because, both in the order of proceeding envisaged for codification and 'progressive development' alike by the Committee for the Progressive Development of International Law, &c., and in that retained in the Statute in respect of the latter alone, the stage of circulation of questionnaires to governments precedes that of report to the General Assembly and thus, presumably, does not call for the prior assent of the latter body. See U.N. Doc. A/AC.10/50, paras. 8–9, and see Art. 17 (2) (*b*) and (*c*) of the Statute. Yet when, in Sub-Committee 2 of the Sixth Committee, the detailed procedure prescribed in the draft Statute for the actual work of *codification* was deleted and the present liberty of the Commission to 'adopt a plan of work appropriate to each case' (cf. Art. 19 (1)) substituted, and this change was protested by the delegate of the U.S.S.R., it was defended by the Brazilian delegate on the ground that 'the only procedure which concerned a matter of principle was that with regard to consultation with Governments, and that although the . . . Commission would draw up its own plan of work, it could not violate the principle of circulating questionnaires to Governments' (A/C.6/SC.5/SR.11, p. 2).

[2] A/CN.4/SR.2, p. 13 (Professor Brierly).

[3] Cf. *Rules of Procedure of the General Assembly*, Rule 12. 'The provisional agenda of a regular session shall include: . . . (*b*) Reports from . . . the subsidiary organs of the General Assembly.'

The issue of the desirability of the Commission's sending questionnaires to Governments, however, remains. See p. 512, n. 6, *supra*. It is to be noted that there is apparently a duty to publish any answers received: see Art. 21 (1) of the Statute (p. 527, *supra*). Such publication, on the interpretation of Art. 18 adopted, presumably precedes presentation to the General Assembly in accordance with Art. 20. And it is not to be doubted that this certainty of publication, precisely because it may induce them to reply to questionnaires from considerations of prestige, will result in the imposition of a considerable burden upon governments.

As to the action already taken by the Commission in regard to the sending out of questionnaires, see p. 516, *infra*.

ing paper,[1] in order to facilitate this process. By this means any need for a precise definition of the criteria of 'necessity' and 'desirability' laid down by Article 18 (2) of the Statute was avoided. The Commission, as it were, struck out those topics the codification of which seemed to it to be unnecessary or undesirable, and 'provisionally retained' the rest.

The first topic to be rejected was that of the subjects of international law, dismissed because a majority of the Commission felt it not to be 'ready' for codification, despite the opinion of several members that 'readiness' was not a relevant test.[2] The topic of the sources of international law was likewise not retained in the absence of any observations by members of the Commission other than that its codification 'would have more disadvantages than advantages' and that the question 'was of no practical interest'.[3] The 'obligations of international law in relation to the law of the State' (i.e. the obligation of states to give effect in their domestic law to the rules of both customary and conventional international law) was regarded as irrelevant, unripe, and perhaps better dealt with by way of a mere declaration that international law had primacy over national law.[4] The question of the fundamental rights and duties of states was postponed for consideration in connexion with the specific item on the Commission's agenda of a draft declaration on the rights and duties of states.[5] What the *Survey* termed 'recognition of the acts of foreign States' but what the Chairman more lucidly expressed as 'the effect given in a State to the acts of other States' was not retained principally because it appeared to belong less to the field of public than to that of private international law, though the desirability of the codification of the topic was acknowledged.[6] The head of the *Survey* entitled 'The obligations of territorial jurisdiction' and embracing the law of hostile expeditions, obligations arising out of civil war, injurious economic use of territory, the international law of nuisance, improper interference with the flow of rivers, exercise of jurisdictional acts within foreign territory, and jurisdiction of courts over persons apprehended in violation of foreign sovereignty, was thought to be too miscellaneous a 'topic' to be retained as such.[7] The no less broad head of 'the territorial domain of States' (i.e. the whole of the rules respecting the acquisition and loss of territory) was similarly rejected.[8] The pacific settlement of international disputes—in the sense of the procedure of settlement—was not retained as its codification was felt to be pointless and possibly a duplication of the work of the Interim Committee of that General Assembly.[9] Extradition was rejected as more properly regulated by bilateral treaties.[10]

What was retained, albeit 'provisionally', was as follows:[11] (1) the recognition of states —without decision as to whether the topic would include also the recognition of governments, belligerents or rebels; (2) state succession; (3) jurisdiction over foreign states— including their property and vessels; (4) jurisdiction with regard to crimes committed outside national territory; (5) the régime of the high seas—by reasons of the 'very wide measure of agreement on the subject';[12] (6) the régime of territorial waters; (7) nationality —and the connected problem of statelessness; (8) the treatment of aliens—as 'a necessary complement to the question of nationality'; (9) the right of asylum—despite the expression of some doubts as to the existence of any corresponding 'obligation not to extradite';[13] (10) the law of treaties; (11) the law of diplomatic intercourse and immunities; (12) the law of consular intercourse and immunities; (13) state responsibility; (14) arbitral procedure—a proposal to widen this head so as to include within it the already rejected topic of the procedure of pacific settlement in general not being accepted.

All these topics were taken from the *Survey*. Indeed, it is interesting to note that only three topics were proposed independently by members of the Commission. The first of these was domestic jurisdiction, the omission of which, as a distinct head of the *Survey*, the Secretariat defended on the ground that it entered into so many other topics. The Commission acquiesced in this opinion and the suggestion was not, therefore, adopted.[1] The second was that of the laws of war. Although omitted from the *Survey*, mention of this topic was made in the working paper prepared on the basis of that document, the Secretariat there expressing the view that concern with it was incompatible with the status of the Commission as an organ of the United Nations and with the Charter. Individual members of the Commission at first expressed disagreement with this opinion. It was thus said that war was still a legal—or at least a physical possibility. But the Commission was reminded by Professors Brierly and Koretsky that its task was to lay the foundations of a peaceful world. The proposal was therefore dropped, as was a further proposal that the topic of neutrality should be taken up also.[2]

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[1] A/CN.4/W.2.

[2] A/CN.4/SR.4, pp. 16–18.

[3] Ibid., p. 18.

[4] Ibid., pp. 18–19.

[5] Ibid., p. 20. See p. 516, *infra*.

[6] A/CN.4/SR.5, pp. 8–9.

[7] Ibid., pp. 10–11.

[8] Ibid., pp. 12–14.

[9] Ibid., pp. 16–18.

[10] A/CN.4/SR.6, pp. 2–3.

[11] See *Report*, para. 16.

[12] A/CN.4/SR.5, pp. 14–15.

[13] A/CN.4/SR. 6, pp. 3–5.

The provisional list of topics which it was thought 'necessary or desirable' to codify having thus been achieved, some discussion took place as to whether or not these should be dealt with as chapters of a code which would ultimately embrace the whole law. Any such general plan was, however, considered too ambitious to be adopted at the very outset of the Commission's work. But it was conceded that fresh topics might at any time be added to the number of those selected so that the 'whole field of international law' could ultimately be at least explored.[3] And it was further tacitly agreed that no serious re-examination of the existing list was necessary in view of its essentially tentative character.

The Commission was thus able to proceed at once to the question as to the order in which it would take up the topics it had selected. There had indeed been some reference to this question during the making of the selection. Thus it had been agreed that no special priority of treatment should be accorded to the question of jurisdiction with respect to crimes committed outside national territory. A similar though less definite reservation was made with respect to the topic of diplomatic intercourse and immunities. Conversely, there was some indication of an intention to give priority to the topic of jurisdiction over foreign states, and at least a plea for priority for the question of the right of asylum. The Chairman proposed that the topics of the law of treaties and of arbitral procedure—'which could almost certainly be successfully codified'—should first be taken up. Other claimants to priority were nationality, the régime of the high seas, recognition—this at the instance of the Secretariat—consular intercourse and immunities and, as already said, the right of asylum. Votes were taken upon the merits of all these suggestions except that relating to recognition. Twelve votes were recorded in favour of the law of treaties, nine for arbitral procedure, five each for the régime of the high seas and for nationality, and three apiece for the right of asylum and for consular intercourse and immunities. The two topics which the Chairman had proposed were therefore placed at the head of the list and, the addition of a third topic to be taken up at once having been proposed, a further vote was taken as between the rival claims of the régime of the high seas and of nationality, the former being selected.[4]

At this point, without having, in the recorded words of the Chairman,[5] taken any 'decision regarding the need or the opportunity of codifying any one of' the topics provisionally selected, the Commission left for a time the first item on its agenda and went on to consider the matters specifically referred to it by the General Assembly, to which it recognized that it was bound to give some sort of priority in virtue of Article 18 (3) of the Statute. The reader of the summary records of the Commission's proceedings might be pardoned if he gained the impression that it never returned to the question of the selection of topics for codification. For the next relevant thing which is touched upon is the approval by the Commission of a paragraph in the Rapporteur's draft report reciting, despite the words of the Chairman quoted, no more than that

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[1] A/CN.4/SR.5, pp. 5–8.

[2] A/CN.4/SR.6, pp. 12–18. In the course of the discussion of the matter Professor Scelle proposed that it should be examined, but under another heading, namely 'of the right of the State to commit a criminal act'.

[3] Cf. *Report*, para. 17.

[4] A/CN.4/SR.7, pp. 6–10.

[5] Ibid., p. 11.

> 'The Commission finally decided to give priority to the following three topics: (1) Law of Treaties, (2) Arbitral Procedure, (3) Régime of the High Seas.'[1]

From there the Commission, it would appear, proceeded directly to the appointment of rapporteurs for these three topics, and to instruct the persons appointed—Professor Brierly for the Law of Treaties, Professor Scelle for Arbitral Procedure, and M. François for the Régime of the High Seas—to prepare working papers for consideration by the Commission as a whole at its second session, which is to be held in Geneva at the end of May 1950.[2] But the summary records do not of course reproduce the actual words which were spoken in the Commission, still less the tacit understandings which its liberal and eminently appropriate application of the rules of procedure made an important feature of its proceedings. Nevertheless, it cannot be denied that the Commission, whilst emerging from its first session with a coherent short-term plan for its future work, did not give entire precision to the extremely vague and unsatisfactory provisions of Article 18 of its Statute. In this it may have been very wise. For a strict application of that article might, as has been seen, require the Commission, having completed its survey and selected topics for codification, to desist from dealing further with them until the ratification of its choice by the General Assembly.

In connexion with the appointment of the rapporteurs named above some discussion as to their functions took place.[3] But this gave little or no further definition to the three very broad topics chosen. There was also a debate on the application of Article 19 (2) of the Statute. It was recognized that it was doubtful whether the Commission was in a position to address detailed questionnaires to governments, even in relation to the three topics selected for codification, at so early a stage in its work. In view, however, of the possibilities of replies being delayed, it was decided to send appropriate questionnaires out at once. The task of formulating these was delegated to the rapporteurs and the Chairman, acting in consultation with the Secretary-General.[4] The questionnaires actually circulated are couched in the broadest form and do little more than recall the terms of Article 19 (2) of the Statute and the Commission's decision to begin work on the three topics mentioned. Nevertheless, they may serve the purpose of enabling a government with a particular interest in any such topic, or in any matter within any such topic, to represent its views thereon to the Commission.

It must be noted that in addition to the three topics selected the special references of the General Assembly have also involved the Commission in some work not capable of immediate completion,[5] as has also Article 24 of the Statute.[6]

4. *The Draft Declaration on the Rights and Duties of States*

After leaving the question of the selection of topics for codification in the fashion stated, the Commission proceeded to take up the first of the tasks specially assigned to it by the General Assembly—the somewhat unenviable one of preparing a

> 'draft Declaration on the Rights and Duties of States, taking as a basis of discussion the draft Declaration on the Rights and Duties of States presented by Panama, and taking into consideration the other documents and drafts on this subject'.[7]

The previous history of the project is set out in the memorandum of the Secretariat here referred to as the *Preparatory Study*[8] which contains principally the Panamanian draft,[9] and the observations thereon of a number of Governments.[10] This matter is, however, preceded by an account of the discussions of the Panama project in the General

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[1] A/CN.4/SR.31, pp. 15–16; cf. *Report*, para. 20, which reproduces the passage quoted.

[2] A/CN.4/SR.33; cf. *Report*, para. 21, p. 5.

[3] A/CN.4/SR.32, pp. 12–14, SR.33, pp. 4–6.

[4] A/CN.4/SR.33, pp. 6–9; cf. *Report*, para. 22.

[5] See p. 522 and p. 523, *infra*.

[6] See p. 524, *infra*.

[7] Resolution 178 (II); see p. 510, *supra*.

[8] A/CN.4/2; see p. 509, n. 4, *supra*.

[9] Pp. 35–131.

[10] Pp. 102–214.

Assembly and the Committee for the Progressive Development of International Law and its Codification. It contains also a mass of annotations in the form of references to earlier instruments or drafts, a bibliography, and various appendices, including one setting out the comments on the Panamanian draft made by scientific bodies. The whole volume thus contained virtually everything the Commission could require for the particular purpose.

As is explained in the historical portion of the *Preparatory Study*,[1] Mexico, the Netherlands, and Cuba all proposed to the San Francisco Conference the inclusion in the Charter of a declaration on the rights and duties of states, and other countries made substantially similar proposals. Committee I/1 of Commission I, however, whilst expressing some sympathy with the idea, decided that the Conference 'if only for lack of time, could not proceed to realize such a draft in an international contract', and concluded that 'The organization [i.e. the United Nations], once formed, could better proceed to consider the suggestion for such a bill of rights of nations and to deal effectively with it through a special commission or by some other method'. Cuba therefore proposed the subject to the Executive Committee of the Preparatory Commission for inclusion in the agenda of the first session of the General Assembly and offered to produce a draft text as a basis of discussion. The General Committee rejected the item on the thesis, which becomes interesting in the light of the reasons given by the members of the Commission who voted against the text ultimately achieved for their inability to vote for it, that the Charter itself constitutes a declaration of the rights and duties of states and represents the farthest extent to which such rights and duties can at present be regarded as going.[2] Cuba returned unsuccessfully to the charge in the plenary meeting of the General Assembly.

Panama had also presented a draft declaration for consideration during the first part of the first session of the General Assembly. That draft was not discussed owing to the defeat of the Cuban proposal to put the entire question on the agenda. But it was circulated to Members of the United Nations and Panama put the question down again on the provisional agenda of the second part of the first session. In consequence the Panamanian draft went to the First Committee, before which body its provisions were exhaustively expounded by its principal protagonist, Dr. Alfaro, and wherein the representative of the Ukrainian S.S.R. observed, not without justice, that 'the origin and nature of the problem dealt with in this draft declaration seemed specific to Latin America' and that its tenor might not appeal to all the world. Ultimately it was agreed that the General Assembly should do nothing about the matter that session. But amongst the proposals made in relation to it was one for its circulation for comment to both governments and scientific bodies, and one to refer it to the newly created Committee for the Progressive Development of International Law and its Codification. The draft resolution (of the General Assembly) presented by the First Committee embodied both these suggestions, together with a further suggested request to the Committee for the Progressive Development of International Law, &c., that it should report on the draft, and on the comments that might be made thereon, to the second regular session, as well as a decision to place the matter on the agenda for that session. The General Assembly unanimously adopted this draft resolution without discussion.[3]

The Panamanian draft, together with the comments thereon of six governments and of three scientific bodies—the latter expressing merely some interest in it—duly came before the Committee for the Progressive Development of International Law, &c. In view of the paucity of comment received the Argentine delegate at once suggested that the Committee was not in a position to discuss the substance of the draft but proposed, because 'of the importance of the question, the consideration of which is essential for the maintenance of peace and security', that the Commission, which the Committee was in process of recommending to be set up, should be instructed to prepare a draft convention on the basis of the Panamanian draft and 'give to the preparation [thereof] the highest possible priority'. In supporting that part of the Argentine proposal which would have deferred consideration of the draft, the French delegate took occasion to adduce as grounds for deferment the unfamiliarity of European states with a project of this nature and their failure to grasp 'the binding force of such a document', and also the modification of the Charter the adoption of the draft would appear to involve. Ultimately the Committee adopted the Argentine proposal with certain amendments. These resulted in there being no recommendation respecting priority and in the reduction of the Panamanian draft from the status of 'a basis of study' to that of 'one of the bases of . . . study'.[1]

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[1] Pp. 13 f.

[2] See *Report*, para. 46, footnote 3, and see p. 519, n. 1, *infra*.

[3] *Preparatory Study*, pp. 20–3.

But the matter did not end even here. The second session of the General Assembly found Ecuador seeking to present a Draft Charter of the Rights and Duties of States which was, however, withdrawn by agreement on the understanding that it was to be treated as embodying the comments of the Ecuadorian Government on the Panamanian draft. It also found Panama urging consideration of its own draft by a special sub-committee of the Sixth Committee on the ground that reference to the Commission would involve too long a delay. Though the proposal was defeated the matter came before Sub-Committee 2 (of the Sixth Committee) both in connexion with the question whether the Committee for the Progressive Development of International Law, &c., should be preserved in existence pending the setting up of the Commission, and also in connexion with the report of the Special Committee of the General Assembly set up to consider the items reported on by the Committee for the Progressive Development of International Law, &c. And, it having been determined that the election of the members of the Commission should not take place until the third regular session, it was proposed that an interim Preparatory Committee should be set up to prepare the way of the Commission and, *inter alia*, to prepare the text of a draft declaration on the rights and duties of states. This proposal was agreed to, the interim body recommended being the still existing Committee for the Progressive Development of International Law, &c. A minority of the sub-committee, however, recorded their disagreement with the proposal, expressing amongst other views one that the question of a declaration of the sort contemplated was an entire problem with which an interim body was unfitted to deal and that the Secretariat could better do the requisite preparatory work. The Sixth Committee agreed with the minority in this regard and rejected the proposal but adopted a draft resolution entrusting preparatory work for the Commission to the Secretariat. It further amended to some extent the sub-committee's specific recommendations as to the proposed draft declaration, adding, in particular, a request to the Secretary-General to draw the attention of Members to the desirability of submitting their comments on the Panamanian draft without delay.[2]

The Commission subjected the Panamanian draft to three readings. The body of the draft consisted of twenty-four lengthy articles, each with a cross-title. Some of these—such as Article 1—were somewhat tautologous: 'Every State has the right to exist and the right to protect and preserve its existence. . . .' Some related to what may be called socio-political rather than legal 'rights'—such as the article already quoted and Article 3: 'The political existence of a State is independent of its recognition by other States. Even before it has been recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity and, consequently, to organize itself as it sees fit, to legislate in regard to its interests, to administer its services, and to determine the jurisdiction and competence of its courts of justice.' Some went perilously near a contradiction of generally accepted doctrine—such as the declaration in Article 7 that 'Foreigners may not claim rights different from, or more extensive than, those enjoyed by nationals'.

As it emerged from the Commission[3] the draft declaration appeared as a different and probably more workmanlike document. It was given the form, not of a convention such as the original draft had, but of a declaration to be adopted and proclaimed by the General

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[1] *Preparatory Study*, pp. 24–7.

[2] Ibid., pp. 28–34.

[3] See *Report*, Part II.

Assembly rather as a standard of conduct than as a system of binding rules. Nevertheless, it corresponded fairly closely to accepted law. It was reduced from twenty-four to fourteen articles. These were made very brief and shorn of titles. These articles declared four rights of states; those of independence—'and hence to exercise freely, without dictation by [*sic*] any other State, all [their] legal powers, including the choice of [their] own form of government' (Art. 1); of jurisdiction over state territory and, subject to the immunities international law recognizes, over all persons and things therein (Art. 2); of equality (Art. 5); and of 'individual or collective self-defence against armed attack' (Art. 12).

Ten duties of states are likewise stated. These include the duty of non-intervention (Art. 3), and that 'to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within [their] territory of activities calculated to foment such civil strife' (Art. 4). These seem to overlap to some extent with each other and perhaps also with the duty of a state 'to ensure that conditions prevailing in its territory do not menace international peace and order' (Art. 7). The last 'duty' stated also overlaps perhaps with that of refraining 'from resorting to war . . . and . . . from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order' (Art. 9). There are also laid down duties to refrain from giving assistance to any state acting in violation of Article 9 or against which preventive or enforcement action is being taken (Art. 10), and to refrain from recognizing any territorial acquisition made in violation of Article 9 (Art. 11). The rather broader duties of abiding by customary and conventional international law (Art. 13), of conducting international relations in accordance with that law (Art. 14), and of settling disputes by peaceful means (Art. 8) are declared. These obviously overlap with each other and, equally, comprehend all others. Finally, there is laid down another very broad duty—that of the state 'to treat all persons under its jurisdiction with respect for human rights and fundamental freedoms, without distinction as to race, sex, language or religion' (Art. 6).[1] The quotations given reveal the origin of the language of the draft. In fact, what the Commission has done for the most part is to select what in the Panamanian draft is *lex lata* and to state it, as often as possible, in the language of the source, which is usually the Charter.

5. *The 'Nürnberg Principles'*

The third item of the Commission's agenda was: (*a*) the 'formulation' of the principles of international law recognized in the Charter and Judgment of the International Military Tribunal, and (*b*) the preparation of a draft code of offences against the peace and security of mankind embracing, *inter alia*, these principles.[2] The uncertainty of the distinction between 'codification' and 'progressive development' drawn in Article 15 of the Statute was particularly apparent in relation to this item. For the General Assembly had previously, by Resolution 95 (1) dated 11 December 1946, 'affirmed' the principles in question.[3] It is true that this affirmation was attended by a direction to the Committee for the Progressive Development of International Law, &c., 'to treat as a matter of primary importance plans for [their] formulation in the context of a general codification of offences against the peace and security of mankind'.[4] However, that Committee having regarded itself as not concerned with the substantive task and having merely reported that the Commission ought to be invited to prepare 'a draft convention incorporating' the Nürnberg principles as well as a 'detailed draft plan of general codification of offences against the peace and security of mankind in such a manner that the plan should clearly indicate the place to be accorded to these principles',[1] when the Commission came to examine the instructions to it framed in accordance with this recommendation, it found some apparent inconsistency between the General Assembly's 'affirming' the relevant principles and its calling for their 'formulation'. Was it intended that the Commission should perform 'a simple legal drafting of already recognized principles', or was it entitled and required to restrict its attention to 'those parts of the Charter and judgment which *in its opinion* constituted principles of international law' as distinct from what the Charter and judgment regarded as international law'?[2]

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[1] 'Mr. Hudson stated that he voted against the draft Declaration because the provisions of its article 6 went beyond the Charter of the United Nations, and beyond international law at its present stage of development' (*Report*, para. 46, footnote 3). Professor Koretsky also voted against the draft 'because . . . it deviated from such fundamental principles of the United Nations as the sovereign equality of all the Members . . .', and for numerous other reasons (ibid.).

[2] See resolution 177 (11) of the General Assembly, quoted p. 510 *supra*.

[3] See *United Nations, Resolutions adopted by the General Assembly, during the Second Part of its First Session*, p. 188.

[4] Ibid.

The history of the General Assembly's direction to the Commission to 'formulate' the Nürnberg principles provides, perhaps, no precise answer to this question which the latter body put to itself. The Committee for the Progressive Development of International Law, &c., suggested that the Commission should be invited to prepare a draft convention embodying the principles adverted to, in addition to a plan for a general codification of offences against the peace. It also recorded its opinion that this task would not preclude the Commission 'from drafting in due course a code of international penal law'; and that the implementation of the Nürnberg principles, as well as the punishment of other conventional international crimes, might render desirable the creation of an international criminal jurisdiction.[3] In Sub-Committee 2 of the Sixth Committee the second of its recommendations was strengthened in that it was suggested that the Commission should be called upon for a draft code of offences against peace and security, and not merely for a plan of such a code.[4] On the other hand, the proposed instruction to produce a convention embodying the Nürnberg principles was amended as 'limiting the Committee [scil. the Commission] too much', the term 'formulation' being substituted.[5] There was also excised the recommendation concerning an international criminal jurisdiction, though this subsequently reappeared amongst the definitive resolutions of the General Assembly, but in a different context.[6] Further, a slightly more imperative tone was adopted, it being recommended that the Commission should be informed that the General Assembly had 'decided to entrust' to it the formulation of the principles in question, instead of its being 'invited' to prepare the more comprehensive code.[7] These changes were endorsed by the General Assembly.[8] Whilst the term 'formulation' is certainly ambiguous, its meaning in relation to the Nürnberg principles is thus not wholly obscure, since what the General Assembly clearly contemplated was the application or statement of these principles as part of a somewhat wider code of offences against peace and security.

The preparatory work before the Commission consisted in the memorandum by the Secretariat entitled *The Charter and Judgment of the Nürnberg Tribunal, History and Analysis*.[9] Part I of this document paraphrases or quotes the Moscow Declaration of 1943, the London Agreement of 1945, the Charter, the indictment, and the verdicts and sentences of the Tribunal. Part II explains the proceedings in the General Assembly, Sixth Committee, and Committee for the Progressive Development of International Law, &c., leading up to the entrusting of the Commission with the question of the Nürnberg principles. The real contribution of the document is made in Part III, which contains an exhaustive analysis of the Charter, the indictment, the defence, and the judgment. It is possible that the paper—which is completed by an Addendum offering a comparison between the Charter and judgment of the International Military Tribunal for the Far East and those of the Nürnberg tribunal, and by appendixes setting out relevant texts—does not sufficiently emphasize the historical connexion or identity between the project for the 'formulation' of the Nürnberg principles and that of the preparation of a somewhat wider code of international offences and the enshrinement of the former amongst the provisions of the latter.

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[1] *Report of the Committee*, loc. cit., p. 508, n. 1, *supra*, para. 2.

[2] A/CN.4/SR.17, pp. 4, 7 (The Chairman).

[3] *Report of the Committee*, loc. cit., p. 508, n. 1, *supra*, paras. 2, 3.

[4] A/C.6/180/Rev.1, quoted in the Secretariat's memorandum referred to at p. 509, n. 5, *supra*.

[5] A/C.6/SR.59, quoted ibid., p. 31.

[6] See resolution 260 (III) B of the General Assembly, quoted p. 510, *supra*; and see p. 523, *infra*.

[7] See p. 510, *supra*.

[8] See resolution 177 (II), quoted p. 510, *supra*.

[9] A/CN.4/5.

Had the Commission borne this connexion or identity in mind, it might have found less difficulty with the expression 'formulation'. But it at first adopted the course of dealing with the Nürnberg principles in isolation, and thus was confronted with the question of the extent to which it was called upon to pass judgment on the pretensions of these principles to be principles of international law. In this regard it took a cautious course, and was careful to record its conclusion that it was 'not asked to express an appreciation of the principles applied in the Charter and the Judgment of the Tribunal at Nürnberg as principles of international law. It [was] asked merely to give formulation to those principles without any indication of their authority'.[1] Possibly this was a sound and statesmanlike resolution of a doubt present in the mind of the General Assembly itself and reflected in the use of the ambiguous term 'formulation'. But its achievement gave rise to another difficulty. Given that, as was agreed, it was no part of the task of the Commission to go into the procedural provisions of the Charter of the Tribunal—except, possibly, in so far as they related to the rights of defendants—what did its task amount to beyond the rephrasing of Articles 6, 7, and 8, and possibly Article 10 of the Charter, wherein the jurisdiction of the Tribunal was defined?

This question was referred to a sub-committee of three members of the Commission, whose instructions were to draw up a working document containing a formulation of the Nürnberg principles. When it appeared, this paper,[2] in the words of the rapporteur of the sub-committee, 'followed closely the provisions of articles 6, 7, and 8 of the Charter of the International Military Tribunal. Indeed, paragraphs (*a*), (*b*), and (*c*) of article 6 of the Charter defined crimes against the peace, war crimes, and crimes against humanity; the sub-committee had adopted these definitions without any modification; articles 7 and 8 of the Charter had also been adopted for the draft with mere drafting changes'.[3] In fact, the only new matter in the eight paragraphs of the sub-committee's draft which was not substantially identical with the wording of the Charter was the first 'principle' laid down therein—that 'a violation of international law may constitute an international crime even if no legal instrument characterizes it as such'. But this was promptly challenged as not being a principle of international law. The rest of the draft was criticized on the ground that, since the relevant articles of the Charter purported only to define crimes within the jurisdiction of the Nürnberg Tribunal, their wording was not a suitable basis for the definition of crimes under international law. The defence of the draft advanced—that the Tribunal had declared the Charter to represent pre-existing general international law—served only to reopen the debate.[4] Nevertheless, by painful steps, the Commission ultimately formulated a statement of principles[5] on the basis of the sub-committee's draft.

It adopted the principle that any individual committing an international crime was liable to be proceeded against in respect of that crime, refusing to admit the phrase 'subject to the existence of appropriate international agreements' as a qualification upon its generality. It decided to abstain from elaborating upon what was meant by 'waging' a war of aggression, or by 'planning' or 'preparing' such a war, and from deciding to what extent a military leader can be held to 'plan' a war or a junior officer to 'wage' it. Likewise it refrained from attempting a definition of a war of aggression. On all these points the Commission held the Charter of the Nürnberg tribunal to be sufficiently clear and itself—despite a representation in the contrary sense by the Secretariat—as bound by the texts of the Charter and judgment of the tribunal. It further held that its own decision[6] not to include the laws of war among the topics selected for codification did not preclude its adopting the sub-committee's faithful reproduction from the Charter of the definition of war crimes as 'violations of the laws of war'. It was also decided, despite the admittedly elastic state of the laws of war, not to enumerate war crimes otherwise than in the non-exhaustive fashion of Article 6 (*b*) of the Charter. However, having regard to the fact that the latter instrument had been drafted with a view to the trial of offences charged in connexion with a particular war, it was decided to omit from the definition of crimes against humanity reproduced from Article 6 (*c*) thereof the words 'before or during a war', so as to make it clear that the conception of crimes against humanity is an independent one notwithstanding the failure of the Nürnberg Tribunal to convict any person upon a charge of such a crime unconnected with a crime against the peace or a war crime. Finally, the Commission decided not to add any statement concerning the criminality of organizations to its list of principles, though it was agreed to insert or restore statements as to complicity, and as to conspiracy as a distinct head of liability. The establishment of maximum sentences was felt to be outside the Commission's functions, although the laying down of a general rule that an accused person has a right to be heard in his defence was thought to be within the scope of its task.[1]

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[1] A/CN.4/SR.17, p. 9. Cf. *Report*, para. 26.

[2] A/CN.4/W.6.

[3] A/CN.4/SR.25, p. 14.

[4] Ibid., pp. 14–18; SR.26, pp. 2–5.

[5] Summarized in A/CN.4/W.7.

[6] See p. 515, *supra*.

In general the Commission, as well as its sub-committee, followed the text of the Charter very closely. This course did not, however, command unanimous support and prompted one member[2] to propose his own individual draft for consideration even after the sub-committee's draft, except for its first paragraph and subject to various amendments, had been provisionally adopted. In so doing he avowed that

> 'in his opinion, the work accomplished so far comprised nothing but an analysis of the Nürnberg Charter and Judgment or, in addition, of the principal international crimes. The Commission had not yet defined any of the fundamental principles of international law which had existed at the time of the Nürnberg Charter and Judgment, and which had been recognized by the Charter and applied by the Judgment. The terms of reference of the Commission were precisely that. The first of these principles, invoked by the Public Prosecution and recognized in the judgment, stated that the individual was subject to international law, including international penal law. . . . The Commission had formulated none of the essential principles which were the subject of . . . his draft; it had merely drawn conclusions from some of them. It was imperative that those principles should be defined, the more so since the Commission was to be asked to prepare a draft code of crimes against international peace and security, of which these principles should constitute the preamble. . . .'[3]

After prolonged discussion it was decided to refer the whole question to the second session of the Commission and to appoint a rapporteur for it.[4]

6. *A Draft Code of Offences against the Peace and Security of Mankind*

The question of the preparation of a draft code of offences against the peace and security of mankind, notwithstanding its interconnexion, both in the text of Resolution 178 (II) of the General Assembly and in the course of the proceedings of organs of the United Nations which resulted in the adoption of that resolution, with the formulation of the Nürnberg principles,[5] was dealt with by the Commission as a distinct *agendum*.[6] Upon it, as has been seen, the Secretariat had presented no specific material. In consequence the Commission proceeded to classify the task involved as one of 'progressive development' rather than 'codification' and to make provision for the application to it of the procedure laid down in Article 16 of the Statute. It was agreed 'that the Rapporteur should be asked to prepare two separate reports on paragraphs (*a*) and (*b*) of the General Assembly resolution 177 (II), as well as a plan of work with regard to paragraph (*b*)'.[7]

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[1] A/CN.4/SR.25, 26, 27, 28.

[2] Professor Scelle.

[3] A/CN.4/SR.28, p. 18.

[4] A/CN.4/SR.31, p. 17. M. Spiropoulos was subsequently appointed. Cf. *Report*, para. 31.

[5] See p. 510 and pp. 519–20, *supra*.

[6] See p. 510, *supra*.

[7] A/CN.4/SR.30, pp. 6–14.

However, the first of the two reports thus called for was presumably expected to be rather upon the *place* to be assigned to the Nürnberg principles in the projected draft code of offences against peace and security and not upon the *formulation* of those principles, as it had already been decided to appoint a rapporteur to deal with this last matter.[1]

However, when it came to the appointment of rapporteurs and the adoption of the Commission's report, the two questions were to some extent merged. Thus the same member of the Commission was appointed as rapporteur both for the continuing of the work of the Commission in the direction of formulation of the Nürnberg principles and for the preparation of the draft code. And there was inserted in the Commission's report a passage stating that that body 'noted that . . . the task of formulating the Nürnberg principles appeared to be so closely connected with that of preparing a draft code . . . that it would be premature . . . to give a final formulation to those principles before the work of preparing a draft code was further advanced'.[2]

7. *Study of the Question of an International Criminal Jurisdiction*

Resolution 260 (III) B of the General Assembly, as has been seen, requested the Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes 'over which jurisdiction will be conferred upon that organ by international convention'.[3] The question here involved had occupied the attention of other organs of the United Nations at different times in two distinct contexts. In the first place, a proposal for an international criminal jurisdiction was made in reference to the formulation of the Nürnberg principles in the Committee for the Progressive Development of International Law, &c., and was brought to the attention of the General Assembly by that body.[4] However, no further reference was made to this proposal either in the Sixth Committee or in the General Assembly itself. The resolution[5] entrusting to the Commission the formulation of the Nürnberg principles did not, in its final form, mention the question.

But the Secretary-General's draft of a convention on genocide, which was in 1947 submitted both to the Committee for the Progressive Development of International Law, &c., and, subsequently, to the General Assembly at its second regular session, provided for the exclusive jurisdiction of an international tribunal over persons charged with committing acts of genocide whilst acting either as state organs or with the support and toleration of states. The same draft envisaged also the optional international trial of all other charges of genocide.[6] Similar suggestions for international trial were contained in the parallel draft of the Economic and Social Council's *ad hoc* Committee on Genocide.[7] Resolution 260 (III) B was framed on the basis that all such suggestions would be rejected, the direction to the Commission to study the whole question therein contained being designed to mollify their proposers. But the Sixth Committee ultimately changed its mind, and Article VI of the definitive Convention thus provides in the alternative for trial 'by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction'. The Resolution, as drafted, was nevertheless allowed to stand.[8]

Various members of the Commission noted that they were not called upon to present any plan, but only to report on the desirability and possibility of an international criminal jurisdiction, and expressed opinions that consideration of the question might be premature before the Nürnberg principles had been formulated, and that there could be no urgency so long as the Convention on Genocide remained largely unratified. However, in deference to the views of other members who thought that the investigation called for ought to be begun at once, it was decided to appoint a rapporteur for the matter, but not to address any questionnaire to governments in connexion with it. In the event, two rapporteurs were appointed, and requested to submit one or more working papers to the second session of the Commission.[1]

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[1] See p. 522, *supra*.

[2] Para. 29.

[3] See p. 510, *supra*.

[4] See p. 520, *supra*.

[5] I.e. Resolution 177 (II), quoted p. 510, *supra*.

[6] The draft referred to appeared as U.N. Doc. A/AC.10/41 and A/AC.10/42/Rev.1.

[7] See U.N. Doc. E/791.

[8] See the Secretariat's memorandum referred to *supra*, p. 509, n. 7.

8. *Ways and Means of Making the Evidence of Customary International Law more readily available*

In connexion with the Commission's responsibility, under Article 24 of its Statute,[2] for considering and reporting on ways and means of making the evidence of customary international law more readily available, which matter also appeared on the agenda of the first session,[3] the Secretariat presented a scholarly and comprehensive memorandum on the subject. Its method and scope are adequately indicated by a reference to its first five headings: Collections of documents on the state practice of particular countries; Digests of the practice of particular countries; Digests of state practice in general; Collections and reports of decisions of international tribunals; and General registers of international decisions. Extensive reference is made to *exposés* of the methods of the works treated made by their authors or compilers and to opinions as to their merits expressed by others. This part of the memorandum is followed by a number of suggestions for improvement of the present literature of international law, from the points of view of quantum and general availability, and a detailed analysis as to the various ways in which the authority of governments and of the Commission, the enthusiasm of non-governmental organizations, and the diligence of government departments, the Secretariat, and of individual scholars might be harnessed together for the production of 'a systematic and comprehensive compilation of evidence of customary international law'.[4] However, just as the Commission rejected any plan of embarking upon the codification of the whole law, so also it held the preparation of a comprehensive collection of all the existing evidence of customary international law to be beyond the bounds of the practicable. Nevertheless, there took place an interesting discussion[5] upon the heads of a working paper[6] which the Secretariat had had prepared upon the basis of its larger memorandum. It was decided to call for a further working paper on the subject from a member of the Commission in order that further progress in the matter might be made at the second session.[7]

STATUTE OF THE INTERNATIONAL LAW COMMISSION[8]

Article 1

1. The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.

2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.

Article 2

1. The Commission shall consist of fifteen members who shall be persons of recognized competence in international law.

2. No two members of the Commission shall be nationals of the same State.

3. In case of dual nationality a candidate shall be deemed to be a national of the State in which he ordinarily exercises civil and political rights.

Article 3

The members of the Commission shall be elected by the General Assembly from a list of candidates nominated by the Governments of Members of the United Nations.

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[1] A/CN.4/SR.30, pp. 15–18; *Report*, para. 34. The rapporteurs appointed were MM. Alfaro and Sandström.

[2] See p. 528, *infra.*

[3] See p. 510, *supra.*

[4] For the full title, &c., see p. 509, n. 6, *supra.*

[5] A/CN.4/SR.31, pp. 19–23, SR.32, pp. 2–11.

[6] A/CN.4/W.9.

[7] *Report*, para. 37.

[8] English text, taken from the official edition, U.N. Doc. A/CN.4/4, 2 February 1949.

Article 4

Each Member may nominate for election not more than four candidates, of whom two may be nationals of the nominating State and two nationals of other States.

Article 5

The names of the candidates shall be submitted in writing by the Governments to the Secretary-General by the first of June of the year in which an election is held, provided that a Government may in exceptional circumstances substitute for a candidate whom it shall name not later than thirty days before the opening of the General Assembly.

Article 6

The Secretary-General shall as soon as possible communicate to the Governments of Members the names submitted, as well as any statements of qualifications of candidates that may have been submitted by the nominating Governments.

Article 7

The Secretary-General shall prepare the list referred to in article 3 above, comprising in alphabetical order the names of all the candidates duly nominated, and shall submit this list to the General Assembly for the purposes of the election.

Article 8

At the election the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 9

1. The fifteen candidates who obtain the greatest number of votes and not less than a majority of the votes of the Members present and voting shall be elected.
2. In the event of more than one national of the same State obtaining a sufficient number of votes for election the one who obtains the greatest number of votes shall be elected and if the votes are equally divided the elder or eldest candidate shall be elected.

Article 10

The members of the Commission shall be elected for three years. They shall be eligible for re-election.

Article 11

In the case of a casual vacancy, the Commission itself shall fill the vacancy having due regard to the provisions contained in articles 2 and 8 of this Statute.

Article 12

The Commission shall sit at the headquarters of the United Nations. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General.

Article 13

Members of the Commission shall be paid travel expenses and shall also receive a *per diem* allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council.

Article 14

The Secretary-General shall, so far as he is able, make available staff and facilities required by the Commission to fulfil its task.

Article 15

In the following articles the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. Similarly, the expression 'codification of international law' is used for convenience as meaning the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine.

A. Progressive Development of International Law

Article 16

When the General Assembly refers to the Commission a proposal for the progressive development of international law, the Commission shall follow a procedure on the following lines:

(*a*) The Commission shall appoint one of its members to be Rapporteur;
(*b*) The Commission shall formulate a plan of work;
(*c*) The Commission shall circulate a questionnaire to the Governments, and shall invite them to supply within a fixed period of time data and information relevant to items included in the plans of work;
(*d*) The Commission may appoint some of its members to work with the Rapporteur on the preparation of drafts pending receipt of replies to this questionnaire;
(*e*) The Commission may consult with scientific institutions and individual experts; these experts need not necessarily be nationals of Members of the United Nations. The Secretary-General will provide, when necessary and within the limits of the budget, for the expenses of these consultations of experts;
(*f*) The Commission shall consider the drafts proposed by the Rapporteur;
(*g*) When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to this document which shall be accompanied by such explanations and supporting material as the Commission considers appropriate. The publication shall include any information supplied to the Commission in reply to the questionnaire referred to in sub-paragraph (*c*) above;
(*h*) The Commission shall invite the Governments to submit their comments on this document within a reasonable time;
(*i*) The Rapporteur and the members appointed for that purpose shall reconsider the draft taking into consideration these comments and shall prepare a final draft and explanatory report which they shall submit for consideration and adoption by the Commission;
(*j*) The Commission shall submit the draft so adopted with its recommendations through the Secretary-General to the General Assembly.

Article 17

1. The Commission shall also consider proposals and draft multilateral conventions submitted by Members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialized agencies, or official bodies established by intergovernmental agreement to encourage the progressive development of international law and its codification, and transmitted to it by the Secretary-General.

2. If in such cases the Commission deems it appropriate to proceed with the study of such proposals or drafts, it shall follow a procedure on the following lines:

(*a*) The Commission shall formulate a plan of work, and study such proposals or drafts, and compare them with any other proposals and drafts on the same subject;
(*b*) The Commission shall circulate a questionnaire to all Members of the United Nations and to the organs, specialized agencies and official bodies mentioned above

which are concerned with the question, and shall invite them to transmit their comments within a reasonable time;

(*c*) The Commission shall submit a report with its recommendations to the General Assembly. It may also, if it deems desirable, before doing so make an interim report to the organ, agency or body which has submitted the proposal or draft;

(*d*) If the General Assembly should invite the Commission to proceed with its work on a proposal, the procedure outlined in article 16 above shall apply. The questionnaire referred to in paragraph (*c*) of that article may not, however, be necessary.

B. Codification of International Law

Article 18

1. The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts whether governmental or not.

2. When the Commission considers that the codification of a particular topic is necessary or desirable, it shall submit its recommendations to the General Assembly.

3. The Commission shall give priority to requests of the General Assembly to deal with any question.

Article 19

1. The Commission shall adopt a plan of work appropriate to each case.

2. The Commission shall, through the Secretary-General, address to Governments a detailed request to furnish the texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other documents relevant to the topic being studied and which the Commission deems necessary.

Article 20

The Commission shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary containing:

(*a*) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

(*b*) Conclusions relevant to:

(i) The extent of agreement on each point in the practice of States and in doctrine;

(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.

Article 21

1. When the Commission considers a draft to be satisfactory, it shall request the Secretary-General to issue it as a Commission document. The Secretariat shall give all necessary publicity to the document including such explanations and supporting material as the Commission may consider appropriate. The publication shall include any information supplied to the Commission by Governments in accordance with article 19. The Commission shall decide whether the opinions of any scientific institution or individual expert consulted by the Commission shall be included in the publication.

2. The Commission shall request Governments to submit comments on this document within a reasonable time.

Article 22

Taking such comments into consideration, the Commission shall prepare a final draft and explanatory report which it shall submit with its recommendations through the Secretary-General to the General Assembly.

Article 23

1. The Commission may recommend to the General Assembly:

(*a*) To take no action, the report having already been published;

(*b*) To take note of or adopt the report by resolution;

(*c*) To recommend the draft to Members with a view to the conclusion of a convention;

(*d*) To convoke a conference to conclude a convention.

2. Whenever it deems desirable, the General Assembly may refer drafts back to the Commission for reconsideration or redrafting.

Article 24

The Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter.

Chapter III. Co-operation with Other Bodies

Article 25

1. The Commission may consult, if it considers necessary, with any of the organs of the United Nations on any subject which is within the competence of that organ.

2. All documents of the Commission which are circulated to Governments by the Secretary-General shall also be circulated to such organs of the United Nations as are concerned. Such organs may furnish any information or make any suggestions to the Commission.

Article 26

1. The Commission may consult with any international or national organizations, official or non-official, on any subject entrusted to it if it believes that such a procedure might aid it in the performance of its functions.

2. For the purpose of distribution of documents of the Commission, the Secretary-General, after consultation with the Commission, shall draw up a list of national and international organizations concerned with questions of international law. The Secretary-General shall endeavour to include on this list at least one national organization of each Member of the United Nations.

3. In the application of the provisions of this article, the Commission and the Secretary-General shall comply with the resolutions of the General Assembly and the other principal organs of the United Nations concerning relations with Franco Spain and shall exclude both from consultations and from the list, organizations which have collaborated with the nazis and fascists.

4. The advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the Pan American Union, is recognized.

REVIEWS OF BOOKS

Annual Digest and Reports of Public International Law Cases, 1943–1945. Edited by H. Lauterpacht, K.C., LL.D., F.B.A. London: Butterworth & Co. 1949. xxxii+584 pp. 55*s*.

The jurisprudence of an effective legal system tends to reflect the problems of the society in which it operates. The extent to which the latest volume of the *Annual Digest* reflects the international scene of the time is a tribute both to the virility of international law and to the success of the Editor and the contributors who have been responsible for this issue of the *Digest*. The fact that the decisions collected are now reported in full, not set out in the form of brief digests, enhances the value of the work from this point of view. It makes it easier for the reader to relate the judgments reported to the problems with which the courts were faced.

A great part of a volume covering the years 1943–5 is necessarily taken up by cases dealing with the law of war. It is particularly satisfactory to find a large collection of German and Italian prize cases. They enable the reader to test the often propounded theory that Anglo-American Prize Law differs fundamentally from that applied in European Prize Courts. In actual fact it would appear that the law applied in the reported cases—which deal with such problems as the knowledge of neutrals of the outbreak of war, the enemy character of a vessel without papers, the passing of property in prize law, &c.—is very similar to that applied in similar circumstances by British Prize Courts.

Various features of the Second World War are reflected in other decisions. On most fronts the war began with a lightning attack by Axis armies. Both German and United States courts have therefore been faced with the problem of determining the precise moment when war began. The whole European continent was overrun by German armies, and there are many interesting decisions on belligerent occupation. In particular, the volume includes several decisions dealing with the effect in occupied territory of legislation enacted by the legitimate sovereign in exile. France, which lived under an armistice régime for several years, provides decisions on the meaning and effect of armistices in international law.

The field of jurisdiction, too, was affected by the war. There are a number of important decisions on the immunity of foreign armed forces from the jurisdiction of local courts. Several Egyptian judgments, such as that in the case of *Manuel* v. *Ministère Public*, restrict immunity to persons on *service commandé*. A decision of the Supreme Court of Canada—*A Reference re the Exemption of United States Forces from Canadian Criminal Law*—illustrates the uncertainty of the legal position. In *Wright* v. *Cantrell* the Supreme Court of New South Wales denied that foreign forces are immune from local jurisdiction in civil matters. The fact that the decisions reported come from courts all over the world points to yet another feature of the recent war.

For the rest, we can see the world picture reflected in cases on recognition. The German annexation of Austria is dealt with by a United States court in *United States ex rel. D'Esquiva* v. *Uhl*. The annexation of Czechoslovakia was a material fact in *Anglo-Czechoslovak and Prague Credit Bank* v. *Janssen*, decided by an Australian court. Courts of the United States have also been concerned with the incorporation of the Baltic states in the Soviet Union. In another series of cases American and Swedish courts have been faced with the question whether to give effect to German and Russian confiscatory legislation. Finally, two most important decisions—*The King* v. *The Home Secretary, ex parte L.* and *United States ex rel. Schwarzkopf* v. *Uhl*—bear on the recognition to be given by foreign courts to German denationalization decrees. Since the war many international lawyers have been preoccupied with the position of the individual in international law. In *Re Drummond Wren* a Canadian court denied the validity of a restrictive covenant based on racial discrimination by reference to Canada's international obligations to promote respect for human rights.

Altogether this is a most interesting volume and one which will, like the eleven volumes that have preceded it, prove of great value to the student of international law.

F. M.

1. *Historical Survey of the Question of International Criminal Jurisdiction.* 1948. 147 pp.
2. *Ways and Means of Making the Evidence of Customary International Law More Readily Available.* 1949. 117 pp.
3. *Survey of International Law in relation to the Work of Codification of the International Law Commission.* 1949. 70 pp.
4. *Preparatory Study Concerning a Draft Declaration of the Rights and Duties of States.* 1948. 228 pp.
5. *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis.* 1949. 99 pp.
6. *Report of the International Law Commission Covering its First Session from 12 April to 9 June 1949.* 10 pp.

All published by the United States. Obtainable from His Majesty's Stationery Office, London.

The first four publications enumerated above are, substantially, memoranda submitted by the Secretary-General of the United Nations as preparatory work within the purview of Articles 18 (1) and 24 of the Statute of the International Law Commission, and of certain Resolutions of the General Assembly. Article 18 of the Statute of the International Law Commission provides that 'the Commission shall survey the whole field of international law with a view to selecting topics for codification'. Article 24 of the Statute lays down that 'the Commission shall consider ways and means for making the evidence of customary international law more readily available . . . and shall make a report to the General Assembly on the matter'. In addition, Resolution 26 (111) B of the General Assembly requested the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes over which jurisdiction may be conferred upon that organ by international conventions. Lastly, Resolution 175 (11), adopted in 1947, instructed the Secretary-General to embark upon necessary preparatory work in connexion with the activity of the International Law Commission with special reference to such questions as the draft declaration on the rights and duties of states.

It is not feasible within the scope of a brief notice to indicate the contents of the informative publications, referred to above, except to the extent of recalling the occasion for their production. In preparing these memoranda the Secretariat of the United Nations has not relied exclusively on its own resources. On the other hand, their official nature and the consequent restraint in argument and presentation increases their usefulness and reliability as a source of information. This does not mean that in presenting these memoranda the Secretary-General has invariably refrained from putting forward suggestions or urging a desirable line of policy. Thus the *Survey of International Law in relation to the Work of Codification of the International Law Commission* ends with the following two sentences: 'Its Statute, which in its principal aspect is the result of a statesmanlike and beneficent compromise between the codification of international law through formal conventions and codification through non-governmental scientific statement and restatement of the law, affords the United Nations the opportunity, long awaited, of removing a grave defect in international law and of enhancing its usefulness and authority as a true system of law. It may properly be claimed that the scope and intensity of the work of the International Law Commission should be commensurate with the significance and the potentialities of the task with which its Statute and the United Nations have entrusted it.'

H. L.

The Law of Nations. An Introduction to the International Law of Peace. By J. L. BRIERLY. Fourth edition. London: Geoffrey Cumberlege; Oxford, at the Clarendon Press. 1949. ix+306 pp. 8*s*. 6*d*.

Professor Brierly's introduction to international law first appeared in 1928. Its place is now so firmly established that it is practically indispensable for the teaching of international law in this country. For a reviewer to attempt to praise it would be a work of supererogation; it will suffice to say briefly what changes have been made in this new edition.

A great deal has happened since 1942 when the 3rd edition was published; the 4th edition, however, is much more than a reprint of the old 'Brierly' brought up to date by the addition of new material. Of course, there are now sections on the United Nations, the International Court of Justice, and the Trusteeship system; and the discussions of the League of Nations, the Mandates system, and the like have been suitably modified: but the author has clearly also taken the opportunity for a careful revision of the whole book. The greater part of the old text remains, for it could hardly be bettered, but the frequent addition or modification of paragraphs, the redrafting of headings, and the insertion of apt references or quotations, show the care with which the whole text has been re-examined and revised to ensure that the work retains its balance and lucidity. There are new sections on servitudes, and on the application of international law in British courts, the discussion of sovereignty has been expanded and improved, and the chapter on Treaties, which in former editions was somewhat sparse, is now expanded into a systematic treatment of the elements of the subject. If one might venture a slight criticism of so admirable a piece of work, it would be that the section on the International Labour Office might well bear, at any rate, one more paragraph dealing with new developments, and the new constitution of the I.L.O. might be mentioned.

R. Y. JENNINGS

Verbindlichkeit und Konstruktion des positiven Völkerrechts. By DIMITRI S. CONSTANTOPOULOS. Hamburg: Rechts- und Staats-wissenschaftlicher Verlag GmbH. 1948. xvi+229 pp.

This is another continental contribution to the study of the basic problems of international law: the question of its binding force and of its relation to municipal law. In examining the subject the author often bases his arguments on logic, rather than on the practice of states. He justifies this by reference to the fact that different concepts of the nature of international law have motivated the practice of states. It might be objected that the answer to the inquiry into the nature of law and the reasons for its binding force cannot properly be derived from a study of the behaviour of the subjects of that law alone.

The first part of the book is a critique of some theories on the nature of international law. That critical examination is not intended to be exhaustive. Some of the most notable exponents of the modern naturalist school are not mentioned, nor is there a discussion of the work of Kelsen. The author is concerned only with the work of those writers who were avowedly or by implication 'dualists'. It may be difficult to criticize a monograph on a subject of this nature. In the literature of international law there will always be found two schools of thought: those who believe that law cannot exist without some form of state organization, and those who, like the author, believe that law is not dependent on an external authority. The arguments of both schools are conditioned by these initial assumptions. It is, therefore, not sufficient to criticize the arguments of the former merely in the light of the postulates of the latter, or to point out that the former view logically leads to a negation of international law. This is an error into which Dr. Constantopoulos occasionally falls, although, on the whole, his criticism is aimed, more constructively, at exposing the fallacies, contradictions, and untenable consequences of the dualist conception of international law.

In the second part the author propounds his own, monist, conception of international law. He discusses the question of the binding force of international law. Like many other writers he recognizes that the crux of the problem lies in the maxim *pacta sunt servanda*. In his view all law is based on the legal consciousness of the persons entering into an obligation. The maxim *pacta sunt servanda* must logically form part of the legal consciousness of states when concluding an agreement. The acceptance of a positive rule logically presupposes the recognition of this fundamental principle which, by its continued acceptance, will prevent the unilateral abrogation of the positive rule even when the state is no longer convinced of the necessity for it. Moreover, the author believes that one cannot escape the consequences of that argument by suggesting that states might, in good faith, cease to accept the maxim *pacta sunt servanda* itself. He justifies that view on the ground that, at the time of entering into an obligation, the conviction is required that the obligation is permanent.

Having thus established a basis for the binding force of international law, the author proceeds to refute the dualist conception of the relation of international law and municipal law. He contends, in effect, that, once the binding force of international law has been accepted, the method of giving effect to international law in the municipal sphere is a technical problem. Failure to make it directly applicable to individuals and superior to municipal laws in conflict with it must be ascribed solely to the shortcomings of individual constitutions. Finally, in a brief chapter, the author examines the practice of states, and notes the relative prevalence of monist and dualist theories.

The work, on its premisses, is well constructed and, on the whole, clearly written. It is not likely to be a book for the average student, particularly as it presupposes some acquaintance with a considerable body of literature. But the specialist in the field, who must concern himself with the jurisprudential problems discussed, will find Dr. Constantopoulos's work worth reading.

F. M.

A Treatise on the Law of Prize. By C. JOHN COLOMBOS, LL.D. The Grotius Society Publications, No. 5. Third edition. London: Longmans, Green & Co. 1949. 421 pp. 30*s.*

Considering the pre-eminence of the British contribution to the law of prize at all times, it is odd that English legal literature is so lacking in systematic works on the modern law developed since 1914. Dr. Colombos's book has indeed no rival. It is a work which must be familiar to any lawyer who has to do with the law of prize in this country and all such will welcome an up-to-date version incorporating the material and cases from the Second World War.

In the first case before the British Prize Court in 1939 Lord Merriman said of the Prize Court Judges of the First World War that 'they were confronted, after the lapse of sixty years, with the task of applying established principles to the changed conditions of modern warfare, and so clearly did they mark the path that it may well be that my task will rather be that of the pedestrian than that of the pioneer'. This has proved an accurate forecast. Although Dr. Colombos has discussed or referred to some 150 new cases, they have all, to use his own words, 'tended towards the clarification and expansion of the old principles, rather than towards any striking innovations'. Perhaps the most important change in the modern law applied during the Second World War—the British rule that an order for the release of goods to a claimant merely operates to make them available to him in this country, thus shifting the emphasis from condemnation back to seizure—had already been laid down by the Prize Court in *The Falk* in 1921; in the Second World War it remained only to see the effect of the decision in operation.

Dr. Colombos still maintains the orthodox position that the Allied blockades of the two world wars must be justified on the grounds of reprisal (e.g. on p. 271); and in this he is, of course, but following the grounds of justification put forward by the Allied Governments themselves. But has not the time come for a reassessment of the position of prize law as a whole? Although the importance of the Second World War in prize law is not to be measured by its innovations, it is true to say that it is precisely the perpetuation and consolidation of the techniques of belligerent control evolved in the First World War that are of greatest significance. These techniques are still in form a temporary addition to the law, founded upon the right of retaliation; but after the fashion of so many 'temporary' buildings it is beginning to look very much as if it will have to serve as a permanent and, indeed, principal structure. The British Retaliation Orders in Council of the two world wars show beyond doubt how a maritime belligerent must and will fight a war of the modern kind, and it is idle to pretend now that the law as embodied in the declaration of 1909 is of much more than historical interest. The traditional uneasy compromise between the interest of the neutral and the interest of the belligerent has tended to give place to an uncompromising ascendancy of the belligerent interest. Nor is there any need to be shocked by this tendency. The traditional prize law had at its centre the strict concept of neutrality, the handmaid of isolationism. If the world is indeed, as we hope, moving towards a more integrated international society, one may expect it to be accompanied by a diminution of that aspect of prize law which enshrines the nineteenth-century repudiation of responsibility on the part of third states which was called impartiality.

We also feel some hesitation in following Dr. Colombos in his sympathy towards the project for an international prize court. He seems perhaps over-sanguine of the present prospects for a codification of international prize law; but a more important objection is surely that the disease of war has now reached a stage where it has gone too far for so mild a prescription, even if it be practicable, to do any good.

However, these are matters of opinion. There can be no differences of opinion on the merits of this work as a systematic exposition of the materials of prize law, and it is a matter for congratulation that its author is not only himself a skilled practitioner before prize courts, but is also one who is able to inform his work with an appreciation of the place of prize law in the context of public international law in general.

R. Y. J.

The Charter of the United Nations. Commentary and Documents. By L. M. Goodrich and E. Hambro. Second edition. 1949. London: Stevens & Sons, Ltd. Published under the auspices of the London Institute of World Affairs. xvi+710 pp. 25*s*.

Since its first publication in 1946 this commentary on the Charter of the United Nations has won an established position for itself. The second edition, in which the authors have been able to describe the actual functioning of the Organization, is therefore very welcome. As in the first edition, the work is divided into three parts. The first contains a historical account of the period preceding the San Francisco Conference, and of the drafting of the Charter, followed by a general description of the Organization and a concise summary of its work up to the summer of 1948. The second part—the largest and most important—is a discussion, article by article, of the provisions of the Charter. The work of expanding the original textual comments on each article by the inclusion of material from the practice of the United Nations has been excellently done. A wealth of material has been compressed into manageable and easily comprehensible shape. The comments on the provisions of the Charter concerning economic and social co-operation are of particular value, for the material relating to these matters—e.g. on the application of Article 58 of the Charter—is, as a rule, less accessible than information relating to the security provisions of the Charter. The third part, a documentary section, contains, besides the Charter of the United Nations and the Statute of the International Court of Justice, a Trusteeship Agreement and an agreement between the United Nations and a Specialized Agency as illustrations of the work of the Organization in those fields.

The aim of the authors is to portray the Charter as it was visualized by those who drafted it and who have been called upon to apply it in practice. As a general rule this limitation is justified. But in some instances a reference to principles of general international law would seem to be essential. Thus, after an account of the Declaration of the San Francisco Conference on the right of withdrawal from the United Nations, it is stated (p. 145) that 'Each member retains the power to withdraw at will'. If the reader is to gain a complete understanding of the subject, some treatment of the question of the interpretation of treaties, and of the admissibility of *travaux préparatoires* in cases where the treaty is silent, would seem to be required.

It is also clear that, of necessity, the authors were compelled to attempt to draw general conclusions from the hesitating and often contradictory practice of the United

Nations. To that extent they cannot avoid the intrusion of their own ideas. Thus, whatever the intrinsic merit of the statement, with reference to Article 2 (7) of the Charter, that 'while discussion does not amount to intervention, the creation of a Commission of Inquiry, the making of recommendations of a procedural and substantive nature, or the taking of a binding decision constitutes intervention under the terms of this paragraph' (p. 120), it is not clear that the practice of the United Nations as described in the preceding pages substantiates that contention.

These drawbacks of the method employed cannot seriously affect the merit of the work in general. They apply to isolated points, and attention is drawn to them only with an eye to the perfecting of so very useful a tool as is provided by this commentary. A more fundamental difficulty is posed by the problem of keeping a work of this nature abreast of events. At a time when many provisions of the Charter remain to be clarified by the practice of the United Nations, parts of the commentary may quickly become out of date. The reader of the present edition is also struck by the fact that the bibliographies given in footnotes after each article do not include much material published after 1947. It may be found useful to revise the work regularly, as has long been the custom with text-books on law, and thus to ensure that the commentary remains a valuable guide to international organization.

F. M.

Gerichtsbarkeit über fremde Staaten. By DR. EDWIN A. GMÜR. *Zürcher Studien zum Internationalen Recht*, vol. 15, 1948. Zürich: Polygraphischer Verlag A.-G. xxv+170 pp.

It may be useful, at the outset, to draw attention to what this book does not purport to do. It is not yet another study of the practice of states and municipal courts in matters of jurisdictional immunities of states. Instead, the author has attempted to trace the development of the doctrine of sovereign immunities by writers and to place it in its historical setting. He notes the absence of any considerable state practice in the matter up to the end of the eighteenth century, owing to the influence of mercantilism, the absence of state trading, and the reluctance of states to borrow abroad. This conclusion, it may be noted, can be supported by an examination of the case law of most countries, such as that of France, set out in *Annual Digest and Reports of Public International Law Cases*, 1938–40, pp. 240–3. The development is thus almost entirely due to writers, and it is the merit of the author to have provided the most comprehensive survey of the relevant but not easily accessible literature of the seventeenth and eighteenth centuries. This brings out clearly that the roots of the doctrine are to be found partly in the provisions of Roman law defining the powers of officials of co-ordinate jurisdiction, and partly in the constitutional law of the German Empire which tended increasingly to grant immunities to individual princes and which, for this purpose, developed a distinction between unrestricted *dominium* over territory and restricted rights of *imperium* or jurisdiction over certain classes of persons. This was based, in part, upon the nature of the acts concerned, according to their being an emanation of the *jus imperii* or of the *jus gestionis*. The interests of absolutism in combination with natural law doctrines achieved the recognition of the immunities of sovereign rulers with the assistance of arguments largely drawn from the law of diplomatic immunities, while the opponents of the new doctrine relied either upon the difference in the function of diplomats and foreign sovereigns abroad or upon an implied submission of the latter, when travelling abroad or when acquiring property there. The doctrine, which originally referred to the person of the sovereign alone, was extended by Vattel to cover the legal position of states abroad. As a result, the end of the eighteenth century witnessed a doctrinal dispute, due largely to the failure to reach agreement whether states are, in principle, sovereign within their own territory and free to curtail their own jurisdiction in accordance with their own concepts of policy and expediency, or whether the rule *par in parem non habet imperium* constitutes a binding rule of international law which imperatively restricts the territorial jurisdiction of states in relation to each other.

The author considers exhaustively the arguments which have been put forward by the two opposing schools of thought in the course of the ensuing centuries. He stresses the need for the supporters of immunity to prove a rule of international law granting immunity rather than for the opponents to prove its absence. In particular the requirement of recognition by the state of the *forum* and the capacity of the foreign state to *renounce* immunity by a simple agreement with an individual appear to disprove the existence of such a rule. This reasoning is strongly supported by the dualist approach of Anzilotti and of the Italian school which the author quotes with respect. He reviews one by one the motives for allowing or disallowing immunity, rejects the status of exterritoriality as a fiction, and regards as inadmissible any conclusions which are drawn from the law of diplomatic immunities. He admits, of course, that the courts of most countries have assumed the existence of a rule of international law based upon the principle *par in parem non habet imperium*, but notes that much doubt has arisen in connexion with the treatment of heads of republics and of certain non-sovereign governmental agencies. He concludes that the function of the equality of states is to delimit their respective physical spheres of operation but not to affect, in the absence of conclusive evidence to the contrary, any transactions whereby their spheres overlap. On the contrary, it follows from the sovereignty of the state of the *forum* that its sphere of operation cannot be fettered by the intrusion of other states in virtue of certain transactions. Turning to these transactions, the author notes tendencies to exclude from the operation of the doctrine of immunity all cases where states have not only expressly consented to submit to the jurisdiction of others, but are deemed to have submitted by bringing or defending actions, owning land or chattels, claiming estates of deceased nationals, floating loans, or setting up commercial establishments. In addition, he notes that in these exceptional cases even levy of execution is supported by the majority of writers, except in so far as it involves legation buildings, men of war, troops in the country with the permission of the local sovereign, war material, aeroplanes, and all objects necessary for the exercise of its functions which are present and exempt by common consent. Next the author turns to an examination of the doctrine according to which transactions *jure gestionis* are not affected by the immunity granted to the state. This doctrine, which has found much support in the practice of courts, is refuted by the convincing argument that the characterization of a transaction as carried out *jure imperii* can only be undertaken by the *lex fori*, with the result that the grant of immunity depends, in the last resort, upon the concepts of the domestic law of the *forum*. *Krajina* v. *Tass*, [1949] 2 All E.R. 274, provides a recent illustration of this method of characterization.

The author has given a thorough historical and critical account of all the doctrines in favour of and against the existence of a rule of international law granting immunity, either absolutely or in certain circumstances, to foreign states before domestic courts. His own conclusions, although not expressed in the form of categorical statements, appear, on balance, to favour those who deny the existence of such a rule outside the realm of domestic law. It is to be regretted that he has not developed his conclusions fully, especially in view of his statement (p. 169) that, in the end, the dispute can be reduced to a mere dissension upon the practical application of the maxim, well known in English law, that 'the foundation of jurisdiction is physical power'.

The realization of that fact could have led to the conclusion that the problem of the immunity of states in domestic courts is merely a variant, in relation to states, of the problem in what circumstances domestic courts are to exercise jurisdiction over persons abroad. In private international law, effectiveness, submission, and the assumed jurisdiction which, in England, is set out in Rules of the Supreme Court, Order XI, determine jurisdiction. Public international law, in attempting to develop its own rules of jurisdiction where foreign states are concerned, may perhaps be said only to have adapted these principles to its own needs. A foreign state, which is in no manner whatsoever present in the country of the *forum*, cannot be effectively subjected to local jurisdiction. On the other hand, this is possible if the foreign state has submitted or has traded, acquired land or chattels, or is in any other way represented within the jurisdiction—cases which also public international law has, to varying degrees, accepted as a basis of jurisdiction. States are, of course, free to extend the sphere of immunity, to concede special exemptions in special cases and to grant absolute immunity to foreign states. Such a theory would only have to explain on what grounds the person of the foreign sovereign, in particular when on a private visit, is immune. It may be assumed, however, that this problem was solved in past centuries when foreign sovereigns (as distinct from states) and foreign diplomats were first granted privileges of immunity according to international law. Modern tendencies, it must be admitted, favour the further extension of immunity by agreement rather than its restriction to the sphere of domestic law, but the reason for it is to be sought in the ever-growing power of local legislatures and executives to interfere on grounds of social policy with all aspects of private life beyond the realm of private law proper, coupled with the reluctance of the local state to impose and the unwillingness of the foreign state to accept such additional measures. The extension of immunity is, however, not inherent in the sovereignty of the foreign state.

K. LIPSTEIN

The Jewish Yearbook of International Law. Edited by N. FEINBERG and J. STOYANOVSKY. Jerusalem: Rubin Mass. 1949. 304 pp. £2. 10*s*.

This new Yearbook of International Law, edited by two Jewish jurists of Israel, and produced in Jerusalem in English, is a distinctive contribution to the study of international law and relations. For centuries the Jews, as individuals or members of an ethnic group, have been eminently the *objects* of discriminatory laws and measures; the objects also of international conferences, diplomatic notes, and humanitarian interventions; and, finally, the objects of the international system of the protection of minorities and of the international trust for a National Home in Palestine. They could not be, before the establishment of the State of Israel, the *subjects* of international law, according to the division which is made by the jurists. Now that Israel is counted among the United Nations, the Jews, as a people, will be represented directly in the International Order.

The *Yearbook*, which was planned and mainly written before the establishment of the Jewish State, is concerned more with the past than the present and the future. It does include, however, Israel's Declaration of Independence; the editors, in their explanatory note to the Declaration, look forward to the Jewish State 'assuming among the powers of the earth the separate and equal station of which the Jewish people has been deprived for centuries . . . in law and in fact Israel has come to stay'.

The articles in the *Yearbook*, as was to be expected, give pride of place to contributions which are concerned with the development of the Jewish National Home under the Mandate. Dr. Feinberg, one of the editors, who is Associate Professor of International Law at the University of Jerusalem, writes on the recognition of the Jewish people in international law. Dr. Stoyanovsky, the other editor, who is the author of a standard book on the Palestine Mandate, writes on Law and Policy in the thirty years of the British Mandatory Administration. He, and not he alone of the contributors, has severe criticism of the Administration and of the whittling away by the British Government of the Trust of the Mandate till in the end it produced a perversion of the Trust. Inevitably, the Jewish writers stress the legal obligations, while the British Administrators were more affected by the facts. Dr. Frankenstein, who was an eminent jurist in Germany, analyses the term 'National Home for the Jewish people'; Professor Akzin, who took part in the long-drawn deliberations at Lake Success, discusses the stormy passage of the Palestine question before the United Nations.

There is a tendency on the part of the Jewish critics of the Mandatory Administration to lay emphasis on the words of international documents, and to extract from them legal obligations. Dr. Akzin, indeed, does point out that in international relations facts enjoy a respect not accorded to principles; and he quotes the dictum of a German legal philosopher: 'Die normative Kraft des Faktischen.' That maxim does not perhaps receive adequate regard in the exposition of the illegalities of the Palestine Administration. All the actions are tested in the scales of the positive prescriptions of the Mandate.

Professor Akzin also points to the substantial differences between the plan for Palestine that was proposed by the Special Commission of the United Nations and the plan which obtained the majority of the votes in the Assembly of 1947. He draws from the decisions of the United Nations about Palestine and the policy of Great Britain in solving kindred problems of India and of Ireland, the conclusion that the idea of partition represents an important stage in the evolution of the doctrine of self-determination. Group identities and group loyalties of large numbers of human beings are recognized to be more important than the preservation of the integrity of territories which have come to be regarded as geographical and political units. In Palestine, as in India, the principle was adopted that, where there is a conflict between the self-determination of a people and the integrity of a territory, the claims of humanity should prevail over the claims of geography.

The second part of the book contains articles about broader aspects of International Law, each of which, however, has some special Jewish interest. Dr. Jacob Robinson, who is a director of the Institute of Jewish Affairs in New York, analyses with great thoroughness the history of the League of Nations with regard to the protection of minorities, and the transition to the new development of international assurance of human rights. Norman Bentwich, who holds the Chair of International Relations at the University of Jerusalem, examines the formation and functions of the International Refugee Organization of the United Nations; Professor Lauterpacht discusses the nationality of denationalized persons, and comments severely on judgments of courts of England, France, and Switzerland which sought to impose the penalties of Germans on those refugees from Germany who had been denationalized by Nazi legislation. 'Overwhelming considerations of fairness and equity demand that . . . the victims of persecution should not be exposed to the hardships and losses attaching to a nationality of which they were deprived by a valid decree of the state responsible for the persecution.' He has made himself the champion amongst international lawyers of human rights. In this article he urges that the general principles of the law of nationality should be applied in a manner consistent with the dignity of the individual man.

Dr. Nehemia Robinson deals with international reparations and restitution, with special reference to the clauses in the Peace Treaties concerning compensation for the victims of Nazi persecution. The extermination of six million Jews in Europe has created a novel problem of heirless property both in the countries occupied by the enemy and in neutral countries. It would be shocking to the public conscience that the state in these circumstances should take for itself the ownerless property. The neutral states concerned agreed to allocate the proceeds of the property for the rehabilitation and resettlement of Jewish victims of Nazi action. The Peace Treaties with Roumania and Hungary contained a provision for the transfer of such properties to organizations representative of the persons and communities which were the object of racial or religious persecution, for purposes of relief and rehabilitation of their surviving members. When the articles were written, no agreement had yet been reached about the treatment of the heirless property in Germany and Austria.

Dr. Goldstein had perhaps a too optimistic judgment of the value of the Convention on Genocide. 'It marks', he said, 'a turning point in the direction of greater limitation of the unconditional sovereignty of states. The conscience of the world deems it necessary to affirm the right to life, to a free existence, and to a spiritual and intellectual development of ethnic and religious minorities.' That will be true only if and when states agree to establish some international organ to implement the Declaration on Human Rights and the Convention on the Prevention and Punishment of the Crime of Genocide.

The most controversial article in the *Yearbook* is written by Professor Kelsen on collective and individual responsibility for acts of state in international law. This distinguished legal philosopher now has a Chair at the University of California. Pursuing his strict conceptual approach to law, he challenges the judgments of the International Military Tribunal of Nuremberg. For him the state only is the subject of international law, save so far as Conventions have expressly defined individual obligations, and that means that acts of states are the contents of the obligations, responsibilities, and rights established by international law. The sanctions provided for violations of those rights are reprisals and war, to be directed by the state whose right has been violated against the delinquent state. He argues that there was no justification in international law for the provisions in the Agreement of London that set up the International Military Tribunal to legislate for the occupied territories of Germany. The victorious Powers could legislate for Germans under general rules of *Debellatio*, but so far as the London Agreement establishes individual criminal responsibility for acts of other European Axis Powers, it is not in conformity with existing international law, since it was concluded without the consent of these Powers. He draws a fine distinction between the trial of the war criminals of Japan and the trials of the German leaders. The Declaration of Potsdam about war criminals was referred to in the instrument of surrender of Japan, who therefore gave her consent to the prosecution and punishment of her war criminals by the Allied Powers. On the other hand, the fact that the Charter of the United Nations does not establish individual criminal responsibility, that is, does not stipulate the most effective sanction for the most detested acts violating the Charter, proves that the governments which concluded this Treaty did not consider themselves to be obliged or authorized by existing international law to prosecute organs of the guilty state as criminally responsible.

Mr. Rowson, Legal Adviser to Israel's Foreign Office, examines in a learned note the action of the British Military Administrations during the Second World War in abolishing anti-Jewish legislation of Nazi and Fascist Governments. Different methods were used in different territories. In some places the military administration simply refused to enforce the legislation. In others it applied in the occupied territory laws enacted by the Italian Government under Allied political and military pressure. Finally, in Germany—since there was no German Government—it took the initiative in conjunction with its American ally in repealing directly the anti-Jewish laws. The Control Council for Germany which, when the article was written, still functioned, took the place of a German Government and could pass enactments for all the occupied zones.

The *Yearbook* is excellently edited, though the conditions of its production were a hard trial for the editors. The press, in which a large part of it was already set, was blown up early in 1948; and they had to start the work again. Then came the invasion of Palestine by the armies of the Arab States and the siege and bombardment of Jerusalem. They themselves had to take their part in the defence of Jewish Jerusalem, and could not resume their task till the winter of 1948.

The book will be a mine of information on special subjects; and the editors indicate that, while in this first issue they had an eye to the past rather than to the future, in the new circumstances of the Jewish people future Yearbooks will require a different approach.

Norman Bentwich

International Law. By Charles G. Fenwick. 3rd edition, revised and enlarged. New York and London: Appleton-Century-Crofts, Inc. 1948. 744 pp. $5.

The teacher and the student of international law have been troubled for some time by the absence—in the English language (in the French and German languages, respectively, Professor Scelle's and Professor Guggenheim's text-books fill the gap admirably)—of a short text-book covering the law both of peace and of war and lying half-way between the larger treatises of Hyde and Oppenheim and Professor Brierly's Introduction. In the reviewer's opinion Professor Fenwick's *International Law* very largely meets that need. Although written by an American scholar it keeps an even balance between American and English sources. On many matters English decisions seem to predominate. Moreover, as might be expected from a lawyer so intimately connected with the Pan-American movement, considerable attention is paid to the practice of Latin-American countries. In fact there is perhaps no other modern short text-book of international law which is more 'international' in presentation and approach. The scope of the text-book naturally precludes detailed doctrinal analysis, but it is hoped that in future editions—of which there are bound to be many—some of the issues involved may be stated in more than general outline. Thus, for instance, the proclamation of the Continental Shelf raises problems wider than a mere change in the policy of the United States. With regard to such matters as the Nuremberg Trial and Judgment it is hoped that the author may go beyond the mere statement of the opposing views on the subject. Some questions, such as the problem of the jurisdictional immunities of states, clearly require more detailed treatment—even in a short text-book—than is accorded to them in the present edition. The somewhat summary exposition of the law and of the activities of the United Nations is largely explained by the fact that the volume was completed at a time when that Organization was only commencing its existence.

The bibliographical apparatus, in a book of these dimensions, is exhaustive and the selection of material admirably judicious. It will increase the usefulness of the book if in future editions the author is able to append a Table of Cases and some additional documents such as a sample Trusteeship Agreement, the constitution of one or two specialized agencies, the Headquarters Agreement between the United Nations and the United States, and the like. In the meantime the student and the teacher of international law have very good reason for expressing their gratitude for a much-needed revised edition of an important text-book. H. L.

Internationales Privatrecht und Rechtsvergleichung. By A. N. MAKAROV. *Recht und Staat*, vol. 144. Tübingen: J. C. B. Mohr (Paul Siebeck). 1949. 44 pp. DM. 1.50.

This is a reprint of an address given by the distinguished expert in private international law and comparative law, Professor Makarov, which summarizes the interrelation between the two branches of study to which he has devoted his life work. There is indeed no field of legal studies in which the comparative method has proved not only more fruitful but also more necessary. The author points out rightly that in private international law comparison may occur at one of two stages. In the first place, the growth of private international law through codification, the development of additional rules, and unification has always been influenced by the comparative study of foreign legal systems, at first by writers and then by the draftsmen of statutes. Professor Makarov, in the first part of his address, gives a fairly comprehensive survey of the writers and writings in France, Germany, and Switzerland which applied this method. He could have added that Story himself, to whom Europe owes so much, drew much of his inspiration from French, Dutch, and German law, and that even before him English courts relied to a great extent upon French practice of the eighteenth century and upon Dutch and French writers, as they rely on American law to-day. While in this sphere comparison is useful, but not essential and serves mainly to strengthen the theoretical basis and the subsequent development of technical rules of the conflict of laws, comparison becomes a practical necessity at the second stage, when foreign law must be interpreted and applied in virtue of established rules of private international law. This process, which is technically known as the process of characterization, is exclusively one of interpreting one legal system in terms of another, and Professor Makarov devotes much of the second part of his paper to this aspect of comparison. In addition he discusses the need for comparative treatment in cases which, in the terminology of Lewald (*Recueil des Cours de l'Académie de la Haye*, 69 (1939) (iii), p. 126), raise questions of transposition, substitution, and adaptation. The purpose of this paper is to show that while comparison, whether eclectic or systematic, can be useful to throw light upon the past, to understand the present and to prepare and forecast the future, it is a matter of necessity whenever the application of foreign law is involved. There can be little doubt that he has abundantly proved that contention.
K. L.

Manuale di Diritto Internazionale Pubblico e Privato. By RICCARDO MONACO. Turin: Unione Tipografico-Editrice Torinese. 1949. xx+694 pp. Lire 2,500.

The publication of a text-book which includes both public and private international law has been of rare occurrence within the last fifty years. To compress both subjects into a book of moderate size is a difficult undertaking which requires wise balancing and judicious omissions, and the present volume must be judged by these standards rather than by its treatment of individual topics. If these criteria are adopted, the author has succeeded well. Public international law occupies rather more than one half of the book. Here the author omits the law of war and the modern problems arising out of the law of war crimes. Instead he concentrates on the law of peace and, fairly comprehensively, on the law of international institutions. The basis of international law and its concepts receive rather fuller treatment than the law in action. This is evident not only from the selection of the material, which is mainly drawn from writers and which tends to neglect the practice of states and the decisions of international tribunals, but also from the comparatively brief discussion of the law of state responsibility. Here an excellent arrangement is rendered less effective by a somewhat cursory treatment of the basic principles of liability, which includes a conception of vicarious liability not normally employed in Anglo-American treatises. On the other hand, the chapters on pacific settlements of disputes and on the United Nations, including its subordinate organs, are models of their kind.

Completeness and conciseness characterize the second part of the book, which deals with private international law. Both general theory, especially as developed in Italy, and individual principles as represented in the Italian Code and, to a lesser degree, in Italian practice, are well integrated into a system which brings out the specifically Italian contribution to the science of private international law. It is possible to disagree with some aspects of the former and to wish for greater insistence upon practice in respect of the latter. Be that as it may, the author has written an excellent introduction to Italian private international law which also provides a reasonably comprehensive guide for the solution of everyday problems in this sphere.

K. LIPSTEIN

Les Nations Unies et les Réfugiés. Le Maintien de la Paix et le Conflit de Qualifications entre l'Ouest et l'Est. By R. NATHAN-CHAPOTOT. Paris: A. Pedone. 1949. xii+292 pp.

In this book M. Nathan-Chapotot concentrates on one aspect of the refugee problem: the definition of the 'refugee'. He begins with an historical survey, and contrasts the 'democratic' approach—to treat the refugee as a human being, at liberty to choose whether to leave his country—with the 'autocratic' attitude, exemplified in the transfers of population for which Germany and Russia were responsible during the Second World War, which treats the individual as a tool of the state. This difference of view between East and West is reflected in their present disagreements concerning dissident subjects of the Eastern states which these regard as traitors but which the West receives as persecuted refugees. The author describes these differences in a long chapter on the drafting of the Constitution of the International Refugee Organization, and in an analysis of the actual provisions of that Constitution. He believes that the refugee problem can only be solved if there is co-operation, both active (financial) and passive (acquiescence in asylum given to political opponents), between states of origin and states of refuge. Accordingly, in his final chapter he attempts to find a way to overcome their dissensions. He concludes that a solution is possible only in the case of 'normal' disagreement between states of origin and states of refuge. The present situation he finds to be 'pathologically abnormal' in view of the fact that the Western states have not recognized territorial changes in the East, and the national allegiance of Balts and Ukrainians is therefore in doubt. The solution he has in mind for 'normal' circumstances is the creation of a democratic international order which will inspire mutual confidence.

The problem dealt with by the author is of great importance. As he points out, disagreements on the matter of the freedom of the individual have been a feature of the refugee problem at least since the eighteenth century. In that period this basic lack of understanding has been the cause of much international ill-feeling. The book is also valuable in that the author draws extensively on United Nations records to illustrate his thesis. However, by concentrating on classification the author somewhat simplifies the subject. He admits this indirectly. When he refers to the Western concept as 'impure' (p. 133) he means that concepts such as 'democratic', 'liberal', and 'humanitarian' have not adequately described all the motives and circumstances involved. Moreover, the author's 'solution' seems to be purely verbal. If the difference between East and West is precisely one between democracy and totalitarianism, who will create the 'democratic international order' from which co-operation is to flow?

F. M.

Prises Maritimes. Jurisprudence Française de la Guerre 1939–1945. Décisions du Conseil des Prises et Décrets en Conseil d'État. Vol. i (1940–6). Paris: Imprimerie Nationale. 1947. xxiv+518 pp.

This is a collection of decisions handed down during the Second World War by the French *Conseil des Prises* and by the *Conseil d'État* acting as court of appeal in matters of prize. The cases reported range over the whole field of the law of prize, and deal with such matters as the time and place of capture, enemy character of vessels, absolute and conditional contraband, transfer of property on the high seas, restrictions on the right of capture, and indemnities. Beside the actual decisions the reports include the submissions of the *commissaire du gouvernement.* This addition proves valuable as the judgments themselves are often very brief. Thus at least in one case—*The Nailsea Court* (p. 387)—the judgment leaves the reader to wonder whether an ultimate destination on enemy territory is generally sufficient in French prize law to condemn conditional contraband. Only from the conclusions of the *commissaire du gouvernement* do we gather that this decision was based, as were similar decisions in England, on the German rationing decrees.

The volume also includes legislative decrees constituting the *Conseil des Prises*, a decree of 1939 providing for the seizure of all enemy exports, and a decree on the procedure of seizure in prize. Finally, there are excellent tables of cases, both analytical and alphabetical. The collection will prove most valuable to specialists in the subject.

F. M.

Reports of International Arbitral Awards. Vol. i (1948), 30*s.*; vol. ii (1949), 30*s.*; vol. iii (1949), 35*s.* All three volumes: 2,231 pp. Published by the United Nations. Obtainable from His Majesty's Stationery Office, London.

These three volumes, prepared by the Registry of the International Court of Justice in consultation with the Secretariat of the United Nations, are a model of what official publications of this kind ought to be. They constitute a major achievement, in the literary field, from the point of view both of providing material for the full utilization of the 'subsidiary means for the determination of the rules of law' referred to in Article 38 of the Statute and of making available the resources of customary international law for the purposes of the progressive codification of international law as envisaged by Article 3 of the Charter of the United Nations. The three volumes cover international arbitral awards rendered in the period between the two World Wars. Neither the title nor the binding indicates the years covered by these volumes—an omission which is unnecessary and which impairs, though only very slightly, the usefulness of this publication. Otherwise it is difficult to exaggerate the praise which is due to those who conceived and executed the project. It fills an obvious gap. Important awards, such as those given by President Huber in connexion with British claims in Morocco, by the President of the Swiss Confederation in the boundary dispute between Colombia and Venezuela, by Dr. Kaeckenbeeck in the dispute between Poland and Germany on the question of nationality, by M. Beichmann in the arbitration between Germany and the Reparations Commission, by three Swiss arbitrators in the interesting case of the Portuguese claim for damages against Germany in connexion with the invasion of Portuguese South West Africa before the First World War, by Dr. Simons, Mr. Nielsen, and Badawi Pasha in the *Salem* case between Egypt and the United States, and by Professor Borel in the matter of the Ottoman Debt Arbitration, have hitherto been available only in specialized libraries or, in a much abridged form, in the *Annual Digest and Reports of Public International Law Cases*. They are here published in full, in the original language of the award. The compilers have wisely decided to include the awards of the Permanent Court of Arbitration although these are available in the late Professor Scott's edition under the Carnegie Endowment for International Peace. To adopt a different course would have meant to impair unnecessarily the completeness of the undertaking. On the other hand, the bulk and the accessibility of the decisions and opinions of the Permanent Court of International Justice have made it undesirable to include them in these volumes.

The third volume concludes with a list of arbitrations and of agents, counsel, and representatives of parties; a chronological list of treaties and arbitration agreements; an elaborate bibliography of collections and digests of international arbitral awards, of writings bearing upon international arbitration, and of works referring to the various awards included in the collection. Above all, there is an analytical Index of nearly a hundred pages which is a scientific achievement and which does high credit to its author. It is an Index produced not by a mere compiler, but by a scholar. Other publications of the United Nations may suitably follow that example. Some of the entries of the Index may appear elaborate to the point of pedantry. Any such appearance is deceptive and fails to do justice to a devoted and highly competent effort.

It is to be hoped that the Registry of the Court and the Secretariat of the United Nations, encouraged by the undoubted success of the present venture, will proceed without much delay to a compilation, conceived on a large scale, of all arbitral awards rendered since the Jay Treaty of 1794.

H. L.

Internationales Zivilprozessrecht. By ERWIN RIEZLER. Beitraege zum Ausländischen und Internationalen Privatrecht, herausgegeben vom Kaiser Wilhelm Institut für Ausländisches und Internationales Privatrecht, vol. 20. Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck). 1949. viii+710 pp. DM. 30.

Civil procedure does not lend itself easily to systematic treatment, and writers of text-books have always found it a struggle to keep a just balance between the technical and theoretical aspects of any domestic law of procedure. These difficulties increase still further when an attempt is made to present the private international law of procedure. The obstacles become nearly unsurmountable when such an attempt is made on comparative lines. It is not surprising, therefore, that the list of works on what may be called 'International Procedural Law' is extremely short (see p. 45) and that between 1897 and 1949 only six books have appeared, all of them either in the German or the Italian language. If only for this reason the publication of this new and up-to-date work would be welcome.

The method of presenting 'International Procedural Law' is one of some nicety. Substantive rules of private international law may be unilateral or bilateral, but they always deal with the twofold problem of when the *lex fori* and when foreign law must be applied. The law of procedure is different. Its rules are unilateral, and foreign law, be it substantive or procedural, is relevant only incidentally or in connexion with the recognition and enforcement of foreign judgments. Bilateral rules are supplied by international treaties, a great number of which, both multilateral and bilateral, have been concluded, with the result that in this sphere of the Conflict of Laws domestic and international law are closely interwoven. This is the first point to be taken into account by text-book writers, and the author has succeeded well in integrating domestic law and treaty provisions.

The second point is peculiar to all comparative studies. It is whether the treatment of the material is to be comparative at all stages or enumerative. This must depend upon the purpose which the work is designed to serve. If it is a strictly practical purpose, the descriptive and enumerative method is clearly to be preferred. If the purpose is to trace the development of institutions and ideas, the method which analyses each institution and principle in a comparative setting is indicated. Professor Riezler has followed a middle path. In so far as any principles of a general nature are concerned, he has adopted the strictly comparative method. The general principles, such as they are, are familiar to all students of the Conflict of Laws. They concern the place of the Conflict of Laws within a legal system, the historical development of and modern doctrines concerning the Conflict of Laws, Classification including Connecting Factors, Nationality, Residence, and the meaning of the term 'foreign country'. Yet Professor Riezler treats these subjects from the angle of procedure and succeeds in presenting them in a new light. His discussion of patents in the Conflict of Laws illustrates this approach.

The bulk of the book is concerned with Jurisdiction, including *prorogatio fori*, submission and exemption of foreign states, diplomats and state-owned vessels, with the Position of Foreigners in Court, including provisions concerning security for costs and poor persons' procedure, with the Effect of Proceedings Pending Abroad (*lis alibi pendens*), Evidence, Proof of Foreign Law, Recognition of Foreign Judgments, Jurisdiction in matters of Arbitration, Recognition of Foreign Arbitral Awards, Levy of Execution, and Judicial Assistance, including letters of request and service of writs and notices abroad.

In each chapter, German, Austrian, Swiss, French, Italian, and English law are studied in turn, but the very full treatment given to these is not quite maintained when English law is considered. This is no blemish, seeing that the book covers a vast field and that recent information on English law was not readily accessible for the author. Nevertheless, some inaccuracies may be pointed out. *Leroux* v. *Brown* (1852), 12 C.B. 801, is not an authority for the proposition that a contract containing an arrangement as to burden of proof must be in English form (p. 44, n. 5); the status of denizenship (pp. 71, 419) and of outlawry (p. 415, n. 7) are given undue prominence. The discussion whether foreign gaming contracts can be enforced in England (p. 127) lacks clarity. *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 67, does not lay down that statelessness is recognized in English law (p. 155, n. 14). The effect of that decision is that renunciation of German nationality without acquisition of another nationality may lead to statelessness according to German law which will be recognized in England. The extension of English jurisdiction in divorce in consequence of s. 13 of the Matrimonial Causes Act, 1937, is overlooked (pp. 291, 426). Gretna Green acquired fame through clandestine marriages, not divorces, as the omission of the word 'heiraten' suggests (p. 330, last line but two). This opportunity has now been barred by the Marriage (Scotland) Act, 1939, s. 5; Marriage (Scotland) Act, 1939 (Commencement) Order, 1940, S.R. & O., 1940, No. 859 (but see p. 330, n. 4). Diplomats enjoy immunity even when they engage in commercial transactions. The wording of the text (p. 345 (*e*)) suggests that the author is referring to diplomats and not to the subordinate personnel when he states that they do not enjoy exemption from jurisdiction in respect of commercial transactions (see J. M. Jones in *Journal of Comparative Legislation*, 3rd ser., 22 (1940), pp. 19–31, and Miss Gutteridge in this *Year Book*, 24 (1947), p. 148). Moreover, the immunity is regulated by the combined operation of statute and common law: *The Amazone*, [1940] P. 40 (p. 357). The immunity of governments in exile is based on the Diplomatic Privileges (Extension) Acts, 1941, c. 7; 1944, c. 44; 1946, s. 66 (p. 403, n. 56). *Taylor* v. *Hollard*, [1902] 1 K.B. 676, 681, does not lay down that the operation of the English Limitation Act is interrupted by an action brought in a foreign court (p. 462, n. 37). The summary of this case in Lapradelle et Niboyet, *Répertoire de Droit International*, 5 (1929), p. 399, n. 215, is not fully accurate.

These are minor inaccuracies in a book which offers exhaustive information on innumerable and not always interrelated topics. Above all, praise must be given for the extensive bibliographies, very full references to case law, and the admirable use of the material provided in treaties. In some respects the book is a product of its time and place of origin. The legislation of the Third Reich, especially as regards former incorporated or occupied territories which have since regained their independence, is given greater prominence than is warranted by its historical relevance. Naturally, the confused political status of Germany which creates many problems of intra-state Conflict of Laws is discussed in detail. But these topical discussions do not seriously affect the character of the book as a whole which will make it a classic among the works of its kind.

K. LIPSTEIN

The Minimum Standard of International Law applied to Aliens. By ANDREAS H. ROTH. Leiden: A. W. Sijthoff's Uitgeversmaatschappij. 1949. 194 pp. Dutch fl. 7.50.

This book, which examines one aspect of the responsibility of the state towards the alien resident on its territory, deserves the careful attention of all those who are concerned with the attempts to codify international law. This subject has long been considered 'ripe for codification'.

The value of the book lies in the careful analysis and comparison of both relevant theory and practice. It is divided into two parts. In the first part Dr. Roth discusses such questions as the admission of aliens, their treatment after admission, and the theories of 'national treatment' and of the 'minimum standard'. He is firmly of the view that the status of the alien is primarily a question of international law, and not of municipal law. International law does not compel the state to open its frontiers to aliens, even when they are unobjectionable. However, the author believes that the indiscriminate use of the discretionary powers of a state in this matter would constitute a serious offence against international comity. He rejects the theory of national treatment, and carefully discusses the doctrine that mere equality of treatment is sufficient.

He ascribes it to 'the elements of conservatism, characteristic of the traditional doctrine of international law, which only in theory preaches the supremacy of the said law and in practice feels so often compelled to compromise with totalitarian demands of the States'. Thus he says, 'the equality doctrine fits perfectly into the widespread conception of the almost absolute sovereignty of the State' (p. 80). He shows that the theory of 'the minimum standard' has the support of international practice in the sense that it is international law alone which determines the status of the alien. A state is obliged by international law to follow a certain line of conduct as regards aliens, and it is therefore not municipal law which governs their situation in the first place. A state cannot invoke its municipal law to escape responsibility under international law. It cannot prescribe national treatment as the rule governing the status of the foreigner. The pages on which the writer advances his arguments in favour of the validity of the theory of the minimum standard form the most interesting part of the book. Probably he is right in saying that the cases concerning *Certain Polish Interests in Upper Silesia* and the *Treatment of Polish Nationals in Danzig*, which came before the Permanent Court of International Justice, cannot be fully relied upon in support of the minimum standard theory. He succeeds, however, in quoting in support of his view a number of cases which have come before international tribunals since 1824—in particular five cases which have been before the Mexican Claims Commission and which Dr. Roth calls 'the backbone of our evidence in support of the international standard'.

In the second part of the book the writer examines the international practice. His guiding principle is that 'the international standard is nothing else than a set of rules, correlated to each other and deriving from one particular norm of general international law, namely, that the treatment of aliens is regulated by the law of nations'. He develops the following minimum standard rules: (1) the recognition of the juridical personality of the alien, in the case both of an individual and of a corporation; (2) the rights and duties connected with the person of the alien such as inviolability of the person, personal freedom, and political rights and duties; (3) rights and duties connected with the economic activities of the alien such as civil rights, the alien's right to work and exercise a profession, and property rights. He then discusses the procedural rights. These, in his view, amount to freedom of access to courts, the right to a fair, non-discriminatory, and unbiased hearing, and the right to a just decision rendered in full compliance with the laws of the state within a reasonable time.

The book is a valuable and useful study which is not without importance in connexion with the discussions concerning an effective International Bill of Human Rights.

J. J. VAN DER LEE

International Law. By GEORG SCHWARZENBERGER, Ph.D., Dr. Jur. In three volumes. Vol. i (second edition): *International Law as applied by International Courts and Tribunals.* London: Stevens & Sons, Ltd. 1949. liv+681 pp.

The first edition of this book was reviewed in the 22nd issue of this *Year Book* (1945, p. 321). The present edition differs little in essentials from its predecessor. The Introduction has been expanded to allow the author to elaborate on his methodology. A chapter on War Crimes, based on the Judgment of Nuremberg, has been added. A comparative synopsis of the Statute and Rules of the International Court of Justice and the pre-war Permanent Court is now appended, together with an excellent bibliography. But these features, together with certain textual alterations and additions rendered necessary by new developments, serve only, it must be admitted, to embellish a work already recognized to be one of considerable significance in the field of international law.

Adequate consideration can hardly be given in a review of this nature to the main content of the volume. The material is presented in a very lucid and compact form. It is indeed a matter for conjecture whether the author has not gone too far in sacrificing continuity for clarity of presentation. It is difficult sometimes to gather whether a quotation from a judgment is to be considered as an integral part of that judgment or as a mere *obiter dictum*. An elaborate system of cross-references minimizes, but does not altogether eradicate, the danger of attaching too much significance to quotations torn from their contexts.

It is perhaps in the field of methodology, however, that the reviewer may wish to take issue with Dr. Schwarzenberger. The inductive method as described by the author is undeniably valuable for any scientific synthesis of the cardinal rules of international law, but it is not altogether new. Moreover, the charges of eclecticism which Dr. Schwarzenberger levels against other writers are based on rather flimsy evidence. That some form of selection from the material available must be made is inevitable. Dr. Schwarzenberger himself admits that 'secrecy can be as effectively obtained by the publication of a flood of material as by burying it in the Tower of London' (Introduction, p. xliv).

These remarks must not be considered as detracting in any way from the merits of the work. Dr. Schwarzenberger has marshalled skilfully the decisions of the International Court of Justice and its predecessor, and has interwoven them with decisions of the Permanent Court of Arbitration and of Mixed Arbitral Tribunals in such a way as to produce a true *corpus juris* of international judicial principles. A certain lack of balance may be discerned as a result of the exclusion of all non-judicial material. But it must be remembered that this is but the first volume of a trilogy, and that Dr. Schwarzenberger's chosen method entails a clear-cut division of the material according to categories of evidence. It is sufficient tribute to the high standard set by this volume to state that the publication of the two remaining volumes is awaited with interest.

I. M. Sinclair

La Technique et les principes du droit public. Études en l'honneur de Georges Scelle. 2 vols. Librairie générale de droit et de jurisprudence. 1950. 909 pp.

Professor Scelle, in whose honour these two volumes of essays have been published, has not only secured for himself recognition as a jurist and scholar. He has gained, as an internationalist and a citizen of the world, the respect and affection of all who have studied his work and who have followed his attitude to the practical problems which have arisen in the past generation. There has been no good cause with which he has not allied himself and to which he has not lent his active assistance. There has been no bad cause which he has not denounced and which he has not declined to make more palatable by reliance on facile realism and by appeal to ethical relativism. His influence on the philosophy of international law and the temper of its science is bound to be lasting and beneficent. It is a privilege for the reviewer of these essays to associate himself with the tribute to Professor Scelle—a tribute in which, it is confidently assumed, all British international lawyers will join with alacrity and reverence.

It is not possible, within the scope of this notice, to do more than survey the wide scope of the contributions to these volumes. While some articles come from writers outside France, these volumes are representative, in the best sense of the word, of the French science of international law. The first volume opens with articles by Madame Bastid on the French-Siamese Conciliation Commission of 1947—an interesting example of recourse to the procedure of conciliation under the provisions of the General Act of 1928—and by Professor Bourquin who, without going to the length of Scelle's affirmation that only individuals are subjects of the law of nations, devotes a penetrating essay to what he describes as the 'Humanization of International Law'. Professor Cassin, who has not only represented the French Republic at the Commission of Human Rights but has also represented it in the true tradition of the Declaration of 1789, pursues the same theme in an article entitled 'The Individual as a Subject of International Law and the Protection of the Rights of Man in the Universal Society'. Dr. Carabiber discusses, appropriately, 'International Federalism in the Work of Professor Georges Scelle'. Similarly, Professor Chaumont develops one of the central issues of Scelle's teaching in an article on 'The Prospects of a Theory of Public Service for the Purposes of Modern International Law'. Professors Cavaré and Delbez, respectively, give a critical account of the Western Union and of the Powers of the Economic and Social Council. Dr. A. Gros, Legal Adviser to the French Foreign Office, discusses the Problem of Jurisdictional Appeal against Decisions of International Organs. The volume includes also articles on Gothofredus and Grotius (by Judge van Eysinga); on Customary International Law (by Professor Guggenheim); on the International Obligations of Morocco (by Professor de Laubadère); on the Trusteeship System in relation to Administrative Unions (by M. Mathiot); on Conflicts of Nationality (by Dean Maury); and on the Theory of Federation (by Professor Moushkély). Dr. Giraud, in an article entitled 'The Rejection of the Doctrine of Sovereignty', gives a stimulating summary—and more than a summary—of his previous work on the subject.

The contents of the second volume are no less rich and instructive. It contains, among others, articles by Professor P. de la Pradelle on the Effect of War on Treaties; by Professor Réglade on the Notion of the State in Public Law and Public International Law; by Professor Reuter on the Legal Status of Individuals in Public International Law; by Professor Rolin on the General Will in International Organization; by Professor Rousseau on the Procedure of Conclusion of Treaties in France; by Professor Wehberg on the Idea of International Organization in the Period of the Hague Peace Conferences; by Professor de Soto on the Individual as the Subject of the Law of Nations; by M. Châtelain on International Recognition; by Professor Guillien on some problems of the Suez Canal in terms of Scelle's theories of *dédoublement fonctionnel*; by Professor Chrétien on Legislative Powers of Taxation in International Law; by Professor Luchaire on the Exercise of Executive Functions of State Organs in the Sphere of International Law; by Professor Simonard on Execution of Judgments; by Professor Berlia on the International Responsibility of States; and by Professor Morange on Nullity in Public International Law.

The volumes include also articles outside the province of international law such as those by Professor Chevallier on Some Aspects of the Constitutional Law of the British Commonwealth of Nations; by Professor Rappard on the Centenary of the Federal Constitution of Switzerland; and—last but not least—by Dr. Kopelmanas on the 'Theory of *dédoublement fonctionnel* and its Part in the Solution of the Problem of so-called Conflict of Laws'. The latter article confirms the reviewer's opinion that there is nothing which Dr. Kopelmanas touches that he does not embellish.

An apology is due to the authors of these essays and to the distinguished scholar in whose honour they were written for what is no more than a catalogue. It is to be hoped that these volumes will be read widely in English-speaking countries and that, in that way, amends may perhaps be made for the absence of a contribution from Great Britain and the United States. That omission, our French colleagues and fellow students may be assured, is in no way indicative of any lack of appreciation, in those countries, of the work and of the qualities of Professor Scelle. This issue of the *Year Book*—in which a tribute is paid to the doyen of British international lawyers—is a proper occasion for the expression of full solidarity with the sentiments of gratitude and recognition which prompted the publication of these two volumes in honour of Georges Scelle.

H. LAUTERPACHT

Das ausländische Privateigentum in der Schweiz. By KARL-GERHARD SEELIGER. Munich: Verlag Wilhelm Steinebach. 1949. 269 pp.

This book is an interesting analysis of the position of private property of foreigners from the point of view of the Swiss *ordre public*. It is divided into six chapters: I. The Development between the Two World Wars; II. Foreign Private Property in Switzerland; III. Protection of Foreign Private Property in the Practice of the Swiss Courts; IV. The Anglo-Saxon and German Laws of War and their Effect on Foreign Private Property in Switzerland; V. Swiss Counter-measures against the Laws of War of the Belligerent Countries and their Policies; VI. The Washington Finance Convention (*Finanzabkommen*) of 25 August 1946, concerning German Assets in Switzerland and the Question of Procedure. The last part of the book contains a comparative study of the treatment of foreign private property in Sweden and Portugal and considers the necessity and possibilities for a new and better protection of private property abroad. The monograph is a valuable guide as to the effect of the Anglo-Saxon and German war legislation on foreign private property regarding Switzerland and, to a lesser degree, Sweden and Portugal.

Some points of detail may be mentioned. On p. 37 the author seems content with the equal treatment of foreigners and Swiss nationals. It would have been appropriate to consider the widely held view that every foreigner has a claim to a minimum standard of justice and that if such standard is not maintained equal treatment of nationals and foreigners is insufficient (Permanent Court of International Justice, Judgment No. 7, pp. 32 ff., and Series A/B, No. 61, p. 243 (*Peter Pázmany University* case). On p. 42 the author refers to transactions relating to payments by Germans to foreigners abroad. He rightly points out that the enactment of legal restrictions as to dealings of Germans in favour of foreigners abroad by the German currency authorities oversteps the limits of German sovereignty and that to that extent the Swiss *ordre public* denies the validity of German statute law. In this respect it may be mentioned that even the practice of the German courts recognized that German currency restrictions had no effect on dealings with movables situate abroad (Hartenstein, *Devisennotrecht* (1935), § 39, p. 293). On p. 78 the author, in discussing the effect of the British Trading with the Enemy legislation of 1939, might have mentioned that not only payments but also the creation of an obligation to pay would be contrary to the principles of the Act against Trading with the Enemy. A person is deemed to have traded with the enemy if he has attempted any commercial, financial, or other intercourse or dealings with or for the benefit of an enemy. This applies even to the transfer of money from the banking account of a neutral to an enemy account in England. On p. 53 the author emphasizes that the Hague Convention of 8 October 1907 concerning Rights and Duties of Neutral Powers and Persons on Land did not prohibit trade with belligerents except in the case of war material, and that therefore Britain's statutory lists were 'clear violations' of public international law. That Convention had never received legislative approval in Britain, although it may be said that it possesses a certain value as to the determination of rights and duties of neutral states and persons. On p. 158 the author points, rightly it is believed, to the merits of the Swedish principles of dealing with bona fide purchasers of looted property. He criticizes the Swiss legislation which gives the courts merely the possibility of awarding compensation in case the bona fide purchaser cannot obtain compensation from the vendor. On p. 202 the author criticizes the decisions of the Paris Conference on Reparations of 1945 as a serious breach of neutrality. He ought perhaps to have attached some importance in this connexion to the fact that the sovereign right to wage war has now disappeared and that the distinction between lawful and unlawful armed forces has been accepted both in the Briand–Kellogg Pact and in the United Nations Charter. The question can no longer be ignored whether an unlawful belligerent can assert full belligerent rights. The author's suggestion, on p. 201, to refer violations of the *ordre public* of a state to the International Court of Justice is valuable. However, the Optional Clause enables parties to the Statute to approach the Court in legal disputes concerning questions of international law or breaches of international obligations.

In general, the author has dealt exhaustively with the measures and methods of the belligerent countries during the last war and during the post-war period. He is to be congratulated on having produced a scholarly and well-reasoned work. His book can be regarded as a contribution of value towards overcoming the impasse which has been developing in international relations regarding private property.

E. H. LOEWENFELD

Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928–1948. Compiled by the Secretariat of the United Nations. Lake Success, 1949. 1,202 pp. Obtainable from H.M. Stationery Office, London. 50*s.*

This very useful collection has been compiled by the Secretariat of the United Nations at the request of the Interim Committee of the General Assembly as a continuation of a similar Survey prepared in 1927 by the Secretariat of the League of Nations. The collection consists of two principal Parts: of the texts of treaties and of a systematic analysis of their provisions. The latter is a work of scholarship which is bound to prove of considerable assistance to both students and practitioners. Its first chapter includes sections on the basic types of treaties, on jurisdictional clauses, and on reservations. The second chapter—on settlement of disputes by judicial settlement or arbitration—contains valuable analytical sections on the manner of the acceptance of the jurisdiction of the Court or of an arbitral tribunal, the definition of legal disputes, special agreements, procedure in cases in which the parties fail to agree upon the terms of the special agreement, appointment of arbitrators, arbitral and judicial procedure, and the law to be applied. The chapter on Conciliation is equally detailed. The draftsman of a Treaty of Conciliation will find there all the information he needs on such questions as the method of appointing members of the commission, its procedure, and its report. There is also a section on the procedures available in case of non-acceptance of the report of the Commission. The second—and main—part of the Survey reproduces, in chronological order, the texts of treaties of pacific settlement, including treaties of friendship and commerce in so far as they provide for the settlement of more general classes of disputes. The various Declarations under the Optional Clause of Article 36 of the Statute of the Court are reproduced in full. The volume, which concludes with chronological and alphabetical tables of treaties, does great credit to the Department of the Secretariat responsible for its production.

H. L.

Osservazioni sul richiamo della legge di occupazione nel diritto internazionale privato. By G. M. UBERTAZZI. Reprinted from *Il Foro Padano*, 1949, No. 11. Milan, 1949. 30 pp.

When the rules of the conflict of laws refer to the law of another country, does this reference include the regulations promulgated by the authorities of a third country which is in military occupation of the country, the laws of which are declared applicable by the rules of the conflict of laws of the *forum*? This question has received little attention hitherto, partly because the situation has not arisen very frequently, seeing that interference with the private law of occupied territory was not usually required or permissable prior to the Second World War, when it became necessary to destroy certain obnoxious features of racial law, and partly because armistice agreements and peace treaties normally place anomalous situations of this kind on a regular footing by incorporating the regulations of the occupying authority into the domestic law of the occupied country. The author starts from the decision of the Court of Milan, dated 10 June 1949, in the case of *I.G. Farbenindustrie* v. *Compagnia Farmaceutica Cofa*, *Foro Padano*, 1949, i, p. 678, in which it became necessary to examine whether regulations of the occupying authorities in Germany dissolving combines had affected the legal status of a combine incorporated in accordance with German law. Proceeding from a formal concept of Italian private international law, which refers to the law of a foreign state and excludes remission as well as transmission, he holds that the regulations of the occupying authority cannot be applied unless they have been incorporated into municipal law. The author regrets this solution but blames the formal rigidity of the rules of private international law. Against this certain objections may be raised, some of which are based upon general considerations and some upon the nature of English private international law. In the first place, it is for the *lex causae*, and not for the *lex fori*, to determine what is the law of the foreign country, and expert witnesses rather than the courts of the *forum* are called upon to fulfil this task. Contrary to the author, it is thus not the rule of Italian private international law which provides the final solution. It must be admitted that this process of reasoning may force the courts of the *forum* to determine questions of foreign constitutional law, but notwithstanding the author's doubts (p. 28) this should not provide an insuperable obstacle to the application of foreign law (see the reviewer's study in *Transactions of the Grotius Society*, vol. 34). In the second place, as regards English private international law, any reference to foreign law is not to the law of a foreign state, but to the law of a foreign country. It is thus a matter of little importance who is the sovereign of the country concerned and whether the territorial sovereign or some other authority has enacted the laws in question, provided that they are actually in force. In addition, it may be necessary to examine their validity according to foreign constitutional law or even according to international law, if the regulations purport to be promulgated in the exercise of powers granted by the latter. The author has tackled a novel situation, and his discussion is stimulating, even if it is not possible to agree with him.

K. LIPSTEIN

Il Diritto Internazionale Tributario. By MANLIO UDINA. *Trattato di Diritto Internazionale*, edited by FEDOZZI and SANTI ROMANO, vol. x, 1949. Padua, Cedam. xiii+459 pp. Lire 3,400.

Private international law determines the application of local and of foreign law by means of rules which are either bilateral or unilateral. If they are unilateral, these rules contain such definitions only when domestic law applies, but no legal system has been able to avoid the application of foreign law altogether, and unilateral rules have thus always shown a tendency towards bilateralism, by a process of extension based on analogous interpretation. Certain branches of private international law, however, rely exclusively upon unilateral rules, not out of respect for an antiquated technique, but for the reason that they are purposely concerned with a process of self-limitation and not with a true process of choice of law. Such branches are the law of international civil procedure, international administrative law, and international tax law. The question is, therefore, whether this attitude represents merely a common practice, based upon considerations of justice and policy, of countries free to determine the sphere of application of their own legislation, or whether any express rules of public international law can be found which delimit the sovereignty of states to enforce their own administrative and tax legislation. The question is not whether a state can enact laws of this kind with extraterritorial effect, for this effect does not exist, seeing that no country is bound to apply the laws of any other country. The question is whether a country is precluded by international law from legislating with effect for its own courts and administration in respect of certain situations which contain some foreign element. The question is thus, in substance, the same in private international law proper and in international administrative and tax law. In the former case it is whether international law requires the introduction of foreign law by domestic courts; in the latter case it is whether international law restricts the application of domestic law by domestic courts without even requiring the introduction of foreign law. To-day a purely negative answer is ruled out, for it is clear that the general rules of international law requiring absence of discrimination and the maintenance of the standards of civilized nations apply to domestic law as a whole, including all branches of the Conflict of Laws.

On the other hand, a categorical answer in the affirmative pointing to individual rules of public international law is also ruled out, at least in so far as private international law is concerned. The question remains whether such detailed rules exist which touch upon any other branch of the Conflict of Laws in the broad sense adopted here. Professor Udina examines this question in its bearing upon international tax law, and his conclusions may be summed up as follows: international tax law is not a special part of public international law (pp. 17, 40), but the principles of international constitutional and administrative law, which define the respective competence of states, apply here as well. Moreover, many bilateral and multilateral treaties deal with this subject, and true rules of customary international law are slowly being developed (pp. 24, 25, 43, 45). The great bulk of material is to be found in the domestic legislation of states which must be studied with a view to finding a common practice which, in turn, may give rise to true rules of international law (p. 28). On the other hand, domestic legislation in matters of international tax law is not a part of private international law. The latter deals with relations between individuals; the former governs the relations between individuals and the state (p. 35). Like private international law, tax law is subject to overriding principles of international law but, in keeping with the distinction drawn above, public international law serves here only to restrict the application of domestic tax law by domestic courts by attempting to define the respective legislative spheres of states (p. 41). Professor Udina realizes that these limitations are mainly to be studied in the light of the legislative, administrative, and judicial practice of states (p. 41), and he does so in five chapters which deal, first, with the territorial and personal limits of taxing powers; secondly, with the exercise of such powers over foreigners; thirdly, with the conflict of taxing powers in respect of persons and territories; fourthly, with the extraterritorial operation of such powers, and, finally, with international collaboration in matters of taxation (p. 55). A detailed examination of tax legislation shows that it employs a technique similar to that used by private international law (p. 62). The operative facts are represented by certain economic situations, such as the existence of property or of a business within the jurisdiction, or the conclusion of a transaction there (pp. 63, 100–2). The connecting factors consist of certain personal elements such as residence, domicil, nationality (pp. 63, 71 ff.). These are usually combined (pp. 108 ff.) but, in contrast with private international law, a rule of international tax law may consist only of operative facts (an objective element), as in the case of land tax, or of a connecting factor (subjective element), as in the case of a capitation tax (pp. 65, 110). Both the operative facts and the connecting factors may appear in various forms. In these circumstances problems of double taxation arise either on personal grounds (pp. 98, 108) or for the reason that one and the same business is carried on in several countries (pp. 68, 111). As in private international law, questions of characterization may arise (see Wengler, *Beiträge zum Problem der internazionalen Doppelbesteuerung, 1935*). The principle of non-discrimination against aliens, established by public international law, applies, but it does not require strict equality in every respect (pp. 84 ff.), although a tendency which has not, as yet, crystallized into a rule of customary law can be observed in treaties of friendship and commerce to insist on absolute equality (pp. 89 ff.). International limitations upon territorial taxing powers resolve themselves into two types, namely, in virtue of self-limitation (p. 141) or in consequence of a true rule of public international law. In substance they are either *ratione personae* or *ratione materiae*. The first category includes mainly the immunities of foreign states, heads of states, and diplomats (pp. 144 ff.); the latter affects such diverse objects as motor-cars in transit, ships in distress, and exhibitions (pp. 181 ff.). Many of these provisions are the products of a common practice, but a great number of exemptions are embodied in multilateral international conventions dealing with such subjects as railways, posts, telegraphs, sugar, hides and bones, lubricants used in aerial traffic, aerial and road traffic, and stamp duties in respect of bills of exchange (pp. 198 ff.). Bilateral treaties attempt to reach the same result by various techniques, such as preferential tariffs or most-favoured-nation clauses (pp. 221 ff.). Exemptions from double taxation provide another striking instance. In the absence of clear rules of international law defining the taxing powers of states (p. 256), only few principles of avoidance of double taxation can claim a supra-national basis, except in virtue of a treaty (p. 266). This important aspect of tax legislation is studied in detail with special reference to treaty practice (pp. 282 ff.) and to draft projects and proposals (pp. 267 ff.).

Special local exemptions which, again, are either based upon self-limitation or upon bilateral agreements (p. 318) concern rivers and canals (p. 298), straits, free sea- and river-ports (p. 315), and specific colonies (p. 338). Public international law alone determines through treaties the extraterritorial operation of taxing powers abroad (pp. 345 ff.). That is effected either by way of a corresponding reduction of local sovereignty or through a system of cumulative taxation. This phenomenon is studied with reference to Protectorates (p. 372), Mandates (p. 375), Customs Unions (p. 376), Leases (p. 376), and countries subject to belligerent occupation (p. 395), to mention only a few instances.

A final chapter deals with international collaboration and mutal assistance in matters of taxation (pp. 405 ff.).

The book covers a very wide range of topics and does so with the help of a remarkably full documentation drawn from international and domestic law and practice. Naturally Italian law and treaties to which Italy is a party figure most prominently, but foreign law and literature are constantly drawn upon. It is not the fault of the author, but of the subject-matter, that the final picture appears somewhat patchy and even blurred. For there is no one system of international taxation. Most of the rules which fall under this common denominator are part of domestic law and are akin to rules of private international law. Like all domestic law they are subject to the overriding authority of the general principles of public international law regarding the treatment of aliens, but public international law provides no special rules relating to taxation. Where public international law does interfere directly it does so by granting immunities which are by no means restricted to or characteristic of the law of taxation. On the other hand, multilateral and bilateral treaties have created stable régimes of international taxation which are, however, restricted to particular situations. Finally, in many spheres of taxation a common practice is slowly developing, but it has not, as yet, created minimum standards with a binding effect for the international community.

K. Lipstein

Yearbook of Human Rights for 1947. United Nations, Lake Success, New York, 1949. Obtainable from His Majesty's Stationery Office. 581 pp. 30*s.*

This second issue of the *Yearbook of Human Rights* represents an interesting and welcome expansion as compared with the first volume. It includes not only, as before, constitutional provisions and legislative enactments, accompanied by explanatory notes, concerned with human rights. It contains also, in Part II, provisions of treaties concluded in 1947 relating to human rights as well as the relevant clauses of the Trusteeship Agreements approved by the General Assembly up to the end of 1947. Perhaps the most valuable addition is that contained in Part III which contains a factual and documentary account of the competence and the activities of the organs of the United Nations concerned with human rights. Thus it includes, in the first instance, information as to the composition of these organs and their terms of reference. These comprise the Economic and Social Council, the Commission on Human Rights, the Commission on the Status of Women, the Trusteeship Council, and the Sub-Commission on Prevention of Discrimination and Protection of Minorities and on Freedom of Information. The recommendations and resolutions of these bodies are set out in detail. Of special interest in this connexion are the rules of procedure of the Trusteeship Council concerning petitions. Their study may dispel much of the current apprehension at the alarming possibilities of admitting the right of petition by individuals to the Commission on Human Rights. From this point of view the editors of the *Yearbook* might consider the advisability of reproducing detailed reports not only of the resolutions of the Trusteeship Council in the matter of petitions, but also the actual discussions of that body in connexion with the examination of petitions and reports of Commissions of the Council sent to the Trust Territories. These discussions are, of course, reported in full in the documents of the Trusteeship Council. However, in that form they are hardly likely to attract the attention of those for whom the *Yearbook* is intended.

The *Yearbook* does not as yet contain decisions of national courts relating to human rights. That matter, which is admittedly of considerable difficulty, is understood to be under discussion. But the review of this second—and highly successful—issue of the *Yearbook* provides perhaps a legitimate occasion for the expression of the opinion that these difficulties are not only capable of a solution but also that they are insignificant when compared with the importance of providing full reports in this field. In particular, the scope of these reports could, in the first stage of the venture, be narrowed so as to include only such decisions as bear upon the interpretation and application of international obligations and instruments in the matter of human rights as well as national bills of rights and comparable constitutional and legislative provisions.

H. L.

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